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WISCONSIN REPORTS

140

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JUNE 3—NOVEMBER 12, 1909

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
JOSHUA ERIC DODGE
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES

Attorney General - - FRANK L. GILBERT

Clerk - - - CLARENCE KELLOGG

MEMORANDUM.

Mr. Chief Justice WINSLOW took no part in the decision of the cases reported in this volume on pages 214 to 387 inclusive. Mr. Justice SIEBECKER took no part in the decision of the cases reported on pages 1 to 182 inclusive.

ERRATA.

VOL. 139.

Page 60, line —4, should read: *John B. Hagerty*, attorney, and *W. H. Stafford*, of counsel, for the plaintiff in error *Miller*.

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CASES DETERMINED

AT THE

January Term, 1909.

SCHWIND, by guardian *ad litem*, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

May 11—June 3, 1909.

Railroads: Depot grounds: Questions for jury: Negligence: Liability for unfenced track: Injuries to children: Contributory negligence: Cause of injury: Instructions to jury: Excessive damages.

1. The question whether a given place is or is not depot grounds within the calls of sec. 1810, Stats. (1898), is ordinarily a question of fact.
2. Failure of the statutory duty imposed upon railroad companies to fence their right of way constitutes negligence, and for injuries proximately caused thereby, and not contributed to by the negligence of the person injured, the company is liable.
3. Where, in addition to the duty imposed upon railroads to fence their right of way, the provisions of the statute impose liability for all damage to persons and animals occasioned "in any manner, in whole or in part, by the want of such fences," an injury may be occasioned in whole or in part by the absence of a fence, although it may not be proximately caused thereby.
4. Under sec. 1810, Stats. (1898), imposing upon railroads liability for damages to persons and animals occasioned by unfenced right of way, proximate causal relation, including reasonable anticipation, is not necessary, and contributory negligence is no defense; the purpose of the statute being to cast upon railroads absolute liability.

[5. Whether the deliberate and intentional entry upon a railroad right of way and tracks by an adult fully cognizant of all the conditions, and with no circumstances of confusion or inadvertence, may be held, as matter of law, not occasioned by absence of a fence, not determined.]

6. Where, in the light of childish tendencies, an injury happens to a child ten years of age upon the unfenced right of way of a railroad, the court cannot say, as matter of law, that his deviation onto the railroad grounds would have so certainly occurred had a fence been interposed as to warrant reversing a finding that the injury was caused in whole or in part by the absence of a fence.
7. In an action for personal injuries happening to a child walking upon an unfenced right of way, it is not error to instruct the jury to consider whether a fence would have "prevented or tended to prevent" plaintiff's entry on the right of way.
8. A verdict of $10,000 for damages sustained by a child ten years of age, consisting of loss of his left arm close to the shoulder, a cut on his head, and bruises and scratches on his face, which was held not excessive by the trial court, will not be disturbed on appeal.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff was injured by being run down by defendant's engine at a point south of Reservoir avenue and near Humboldt avenue in the city of Milwaukee. At that place the defendant maintained several substantially parallel tracks for various purposes. The railroad premises were bounded on the north by Reservoir avenue, a narrow unpaved street running east and west. Coming from the north, Bremen street terminated in Reservoir avenue, and some two blocks east Humboldt avenue, a main business thoroughfare, crossed the railroad tracks. Reservoir avenue connected Bremen street and Humboldt avenue, but on the day in question was very muddy and unpleasant for passage. The railroad grounds were in better condition, and there was a much used foot-path along one of the tracks, the third or fourth south of Reservoir avenue. Plaintiff, a boy about ten years old, of apparently average intelligence, was sent from his home on Bremen street near Reservoir avenue to a place on Humboldt avenue, also north of Reservoir avenue. He started southward on Bremen street, incumbered by a basket for groceries, and passed onto the railroad grounds and took the path

above mentioned along the so-called roundhouse track, where he was injured by an engine coming up behind him. The railroad grounds were not inclosed by any fence. The jury found by special verdict in the first answer that the place in question was not depot grounds, and, by answer to the sixth question, that plaintiff's injury was caused in whole or in part by the fact that the defendant company had not fenced its right of way at the point where the plaintiff entered upon it. Other negligence was also found as the proximate cause of plaintiff's injury, as also the absence of contributory negligence.

[Plaintiff was drawn under the wheels of the engine or tender, which cut off his left arm close to the shoulder. Plaintiff also received a cut on the head, and his face was bruised and scratched, but he otherwise received no injury. The verdict was for $10,000.]

After a motion for a new trial, and also a motion to reverse the answer to the sixth question, among others, had been overruled, judgment was entered for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

DODGE, J. Appellant's first contention is that the *locus in quo* was in fact depot grounds, although he assigns no error either upon the answer to the first question in the special verdict or to the refusal of the court to set it aside. Disregarding such omission, however, there was much evidence introduced with reference to the use which was made of the various tracks as well as of the location of the place of injury with reference to any station, and the jury were aided by a view in passing on accessibility to the public for loading freight. The question whether a given place is or is not de-

pot grounds, within the meaning of sec. 1810, Stats. (1898), is ordinarily a question of fact. *Grosse v. C. & N. W. R. Co.* 91 Wis. 482, 65 N. W. 185; *Cole v. D., S. S. & A. R. Co.* 104 Wis. 460, 80 N. W. 736; *Habenicht v. C., St. P., M. & O. R. Co.* 126 Wis. 521, 105 N. W. 910. In the present case the evidence quite clearly was such that the jury within their province might well have found in the negative as they did.

The next material contention of the appellant is advanced under the form of an attack upon the sixth finding that the plaintiff's injury was caused in whole or in part by the absence of a fence. Counsel supports his contention mainly by cases decided under very different statutes and involving radically different principles and reasons from those applicable to our statutes: statutes which merely command railroad companies to fence their rights of way, and under which it is held that failure to do so, being a breach of the law, is an act of negligence. Such cases are entirely analogous to the decisions of this court under statutes prohibiting excessive rates of speed and requiring ringing of bell. Sec. 1809, Stats. (1898); *Ransom v. C., St. P., M. & O. R. Co.* 62 Wis. 178, 22 N. W. 147; *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, 46 N. W. 165. The principle there involved is merely that the failure of the statutory duty constitutes negligence from which the courts start with the logical deduction that for injuries proximately caused thereby, and not contributed to by the negligence of the person injured, the company should be liable. In the application of that rule there has been much discussion whether proximate causal relation can exist between the absence of a fence and the intentional entry upon railroad grounds by one in the full exercise of his faculties and competent to use judgment, choice, and volition, as in the two cases cited by appellant from Minnesota. *Fezler v. W. & S. F. R. Co.* 85 Minn. 252, 88 N. W. 746; *Schreiner v. G. N. R. Co.* 86 Minn. 245, 90 N. W. 400. It was in the

application of these same principles that *Schmidt v. M. & St. P. R. Co.* 23 Wis. 186, was decided, where it was held, under a statute not expressly imposing liability for injury to *persons*, that the absence of fence might be proximately causal of an injury to an infant too young to exercise judgment or volition. All such cases are, however, beside the question presented by our present sec. 1810, Stats. (1898), for that, in addition to commanding the railroads to build a fence, expressly provides that in its absence "such road shall be liable for all damages done to cattle, horses or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by want of such fences or cattle-guards." An injury may well be occasioned in whole or in part by the absence of a fence, although it may not be proximately caused thereby. It is enough if such omission gives occasion for entry on the place of injury. *Curry v. C. & N. W. R. Co.* 43 Wis. 665, 676.

It has already been decided that proximate causal relation, including the element of reasonable anticipation, is not necessary, but merely that the railroad's omission shall be *causa sine qua non*. *Atkinson v. C. & N. W. R. Co.* 119 Wis. 176, 96 N. W. 529; *Hayes v. Mich. Cent. R. Co.* 111 U. S. 228. Also, that contributory negligence of the respondent is no defense. *Quackenbush v. W. & M. R. Co.* 62 Wis. 411, 22 N. W. 519; *S. C.* 71 Wis. 472, 37 N. W. 834. The purpose of this statute was to cast upon the railroads absolute liability for injuries to cattle whose entry upon the tracks was made possible by absence of the prescribed fences, and when it was amended in the revision of 1878 by the addition of "persons," the extension of the same purpose to human beings was obvious.

The question to be decided in this case, therefore, is not whether the injury to this plaintiff was proximately caused by the absence of a fence, but whether, in the exact language of the statute, it was "occasioned in any manner, in whole or

in part," by such absence. We need not decide whether the deliberate and intentional entry upon a railroad right of way and tracks by an adult fully cognizant of all the conditions, and with no circumstances of confusion or inadvertence, might be held, as matter of law, not occasioned by the absence of a fence, for that case is not presented, and we need not theorize as to whether presence of a fence would have availed to counteract such deliberate purpose. On the other hand, if, by reason of storm, inability to observe, or lack of knowledge of the exact location, even an adult of full intelligence should wander from a highway onto an adjoining railroad right of way, it would be difficult to discover any reason why he might not come within the intent and purpose of the act as clearly expressed by its unambiguous words. In the case of children other elements, however, are presumptively present. They lack in greater or less degree, according to age, development, and intelligence, the pertinacity of purpose and the soundness of judgment of the adult. Their conduct is often controlled by propensities, temptations, curiosities, and obstacles which would not materially affect that of the adult. This consideration has been recognized by this court in many cases. *Meibus v. Dodge,* 38 Wis. 300; *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219; *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 109 N. W. 650. All these childish tendencies must be taken into account in weighing probability of childish action. In the light of them, and of the fact that this boy was on his way from Bremen street eastward to Humboldt avenue, a distance of 400 or 500 feet, and was confronted by the muddy road and tempted by the better pathway near the railroad tracks, although he in a measure appreciated and understood the danger of the latter course and was able to exercise some measure of intelligent judgment, is it certain that, if his entry upon the latter course had been obstructed by a substantial fence such as the law requires, he would have persisted in overcoming that obstacle,

instead of pursuing the safer pathway along Reservoir avenue, or even conceived the plan? We think not. The situation presented an opportunity for inference by reasonable men familiar with human and boyish tendencies and with complete knowledge of plaintiff's intelligence and maturity, such as the jury were qualified to draw, and we cannot say as a matter of law that his deviation onto the railroad grounds would so certainly have occurred even had such fence been interposed that the court should have answered the sixth question in the negative. The mere absence of a required obstacle or warning has often been held to support an inference that its presence would have affected conduct even of mature persons; much more justifiable is such inference in case of children or animals. *Schmidt v. M. & St. P. R. Co.* 23 Wis. 186; *Schrier v. M., L. S. & W. R. Co.* 65 Wis. 457, 459, 27 N. W. 167; *Blomberg v. Stewart,* 67 Wis. 455, 30 N. W. 617; *Palmer v. N. Y. C. & H. R. R. Co.* 112 N. Y. 234, 19 N. E. 678.

Error is assigned upon the charge under the sixth question because the court told the jury to consider whether a fence would have "prevented or tended to prevent" plaintiff's entry on right of way. In this we discover no error. The tendency of a fence to prevent the entry was proper to be considered in answering the question whether plaintiff's injury was caused by absence of such fence as the law requires. Of course defendant would not be liable merely because of such tendency alone, but no charge to that effect was given.

The findings that the *locus* was not depot grounds, and that absence of fence caused the plaintiff's injury, are sufficient to support judgment for plaintiff, and we need not discuss any errors assigned or committed in connection with other forms of negligence alleged and found against defendant, or with the question of plaintiff's contributory negligence.

Contention is made that the verdict, $10,000, is excessive.

While it is larger than we might approve as an original proposition, yet it is not substantially larger than courts have often sustained for similar or equivalent injuries. *Schmidt v. M. & St. P. R. Co., supra; Berg v. C., M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Nadau v. White River L. Co.* 76 Wis. 120, 43 N. W. 1135; *Baltzer v. C., M. & N. R. Co.* 89 Wis. 257, 60 N. W. 716; *Yerkes v. N. P. R. Co.* 112 Wis. 184, 88 N. W. 33; *Chicago Anderson P. B. Co. v. Rembarz,* 51 Ill. App. 543. It has been held not excessive by the trial court, whose opportunity for knowledge is better than ours. We cannot feel justified to disturb it.

By the Court.—Judgment affirmed.

MAHN and wife, Respondents, vs. CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY and another, Appellants.

May 11—June 3, 1909.

Vendor and purchaser of land: Sufficiency of conveyance tendered: Contract for exchange: Remedies for breach: Equity: Adequacy of remedy at law: Rescission: Lands occupied by railroad by owner's consent: Cloud upon title.

1. Whether, where a railroad company had agreed to procure certain land and convey it to plaintiffs "by good warranty deed" in exchange for land owned by them, the tender to them of a full warranty deed from the true owner of the land might be held a sufficient performance on the part of the company, even without covenants of warranty from itself, not determined.
2. Where, in such case, plaintiffs were informed when such warranty deed was tendered that the grantor named therein held title "in trust" for the railroad company, and that the consideration for the land had been paid by the company, the nature of the trust not being disclosed, they were not bound to accept the deed as a compliance with the contract.
3. Upon the failure of the company to perform on its part the agreement to exchange lands, plaintiffs had the right either to sue for damages for the breach or to rescind the contract. The com-

pany could not compel them to sell their land for a sum of money which they had never agreed to accept.

4. Plaintiffs in such case having brought suit in equity for rescission of the agreement, the failure of the railroad company to object may be deemed a consent that the court, by exercise of its equitable powers, grant whatever form of relief is proper under the circumstances.

5. The agreement for exchange of lands having been followed by completed construction of the railroad over plaintiffs' land, no mere recovery at law could fully re-establish plaintiffs' rights, since the transaction amounted at least to a consent to the construction of the road, and such a status, once created by consent, would not be disturbed.

6. Unless completely rescinded, the written agreement for exchange would constitute an obstacle to plaintiffs' obtaining statutory compensation for the part of their land applied to railroad uses, and even after declaration of rescission it would be a cloud upon the title which equity should remove.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The defendant railroad company laid out and surveyed its lines approximately north and south through plaintiff's tract of nearly forty acres, so as to leave about eighteen acres to the eastward of the right of way separated from the farm buildings. A written contract of date April 27, 1907, was entered into, whereby the plaintiffs agreed to convey all east of the west line of the 150-foot right of way, and in consideration thereof the railroad company agreed to procure and convey to them approximately the same amount of land on the west side of its right of way, joining theirs on the south, and to pay $800 in money, each party to go into immediate possession and the deeds to be passed within thirty days upon completion of survey. The plaintiffs agreed to convey by warranty deed and to furnish abstract. The company agreed to convey "by good warranty deed," but said nothing about the abstract. It was not, at the time of the contract, the owner of the land agreed to be conveyed by it. Possession was taken by each party and the railroad company proceeded

to grade its right of way, making an excavation which is now some twenty-seven feet in depth at the deepest point, and laying its tracks as a part of its line of railroad from Milwaukee to Chicago. It procured the land on the west side of the track, taking title, however, in the name of an agent, Josie Shenners, in trust for the company, in order that the record title should not be embarrassed by a general mortgage upon all its property then owned or thereafter acquired, under which, up to the present time, some $10,000,000 of bonds have been sold. It also paid to the plaintiffs the $800 cash consideration. On August 3d, after submitting satisfactory abstract, the plaintiffs tendered warranty deeds and demanded deed from the company. The latter offered conveyance by warranty deed from said Josie Shenners, who had good record title. The plaintiffs refused to accept, and on August 15th notified the company in writing of their election to rescind the contract, accompanying such notice with a tender of the money they had received from the railroad company. This suit was brought to declare rescission of that contract as a cloud upon the title of plaintiffs' said real estate. Receivers of the railroad company having been appointed in some undisclosed proceeding in United States circuit court, they were joined as parties defendant. The defendants offered upon the trial to supplement the deed of Josie Shenners by full covenants of warranty on the part of the railroad company. The court rendered judgment that the written contract be rescinded, canceled, and declared null and void upon delivery to defendants of the said $800 and of a certain abstract delivered to the plaintiffs. From such judgment the defendants appeal.

T. W. Spence, of counsel, for the appellants.

Christian Doerfler, for the respondents.

DODGE, J. The first question seriously discussed is whether the railway company has so failed in performance on

its part of the contract for the exchange of lands that plaintiffs ought not to be held to performance on their part. That it did fail, and declare its inability, to make conveyance in technical compliance with its agreement, on demand, is confessed, but whether the tender of a full warranty deed from the true owner of the land might not be held a sufficient compliance, even without covenants of warranty from the company, is, to say the least, doubtful, standing alone. *Bateman v. Johnson,* 10 Wis. 1. In the instant case, however, that is not the only defect. With the tender of the deed from Shenners came the information that she held title "in trust" for the railroad company, and the intimation at least that the consideration for the land had been paid by the company. Whether this was a trust duly declared in writing was not disclosed, nor, if so, whether active or passive. If passive, so that title at once vested in the railroad company, would not the lien of the mortgage immediately fasten thereon? If active, would the proposed conveyance to plaintiffs be in breach of it? If there was no express trust, was not the title of Shenners clouded by the possibility of a resulting trust in favor of all creditors under sec. 2078, Stats. (1898), subject to plaintiffs' ability to overcome the presumption of fraudulent intent created by that statute? We do not think a conveyance casting upon the grantee the burden of answering at his peril such conundrums as these is the equivalent of the perfect title for which plaintiffs had agreed to convey their lands.

When the railroad company thus failed to carry out its part of the executory agreement plaintiffs had the right either to sue for damages for the breach or to declare their election to rescind. The company, being unable to carry out the contract to exchange certain lands, could not compel plaintiffs to sell their land for a sum of money which they had never agreed to accept. *Akerly v. Vilas,* 15 Wis. 401, 413; *Booth v. Ryan,* 31 Wis. 45, 58; *Lutz v. Compton,* 77 Wis. 584, 46

N. W. 889. They adopted the latter course, thereby, of course, surrendering all rights, equitable or otherwise, in the lands which the company had agreed to convey them and their right to retain the money consideration which had been paid them. They accordingly tendered full surrender and repayment. Their right then became perfect to receive from the railroad company all that they had parted with to it in pursuance of the contract. Doubtless, so far as a complete enforcement of that right could be had in a court of law, the plaintiffs should there seek it, and not apply to a court of equity unnecessarily for relief; but they have applied to a court of equity and the defendants have raised no objection to their so doing, which of itself may be deemed a consent that the court, by exercise of its equitable powers, may consider and grant whatever form of relief is proper under the circumstances. *Smith v. Putnam,* 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288. Apart from such consideration, however, the situation is so complicated by the construction, now completed, of a public railroad over the land that no mere recovery at law can fully re-establish plaintiffs' rights. But for that fact they might seek recovery of the possession of all their land with which they had parted in pursuance of the contract. But that transaction had at least served the purpose of a consent to the construction of the railroad over a portion of this land, and the policy of our statute law is against the disturbance of such a status once created with the consent of the owner. Sec. 1852, Stats. (1898); *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623; *Babcock v. C. & N. W. R. Co.* 107 Wis. 280, 83 N. W. 316; *Stewart v. Milwaukee E. R. & L. Co.* 110 Wis. 540, 86 N. W. 163; *Brickles v. Milwaukee L., H. & T. Co.* 134 Wis. 358, 114 N. W. 810. Still the written agreement, unless completely rescinded, continually confronted plaintiffs as an obstacle to obtaining statutory compensation for that part of the land applied to railroad uses. The question of the effectiveness

of their attempted rescission *in pais* was, at the time of the commencement of the action, one which could be answered finally only by a decision of a court. The contract, therefore, presented, even after declaration of rescission, a cloud upon the title of their lands, and an obstacle to the sale thereof, the removal of which is inherently a function of equity, and, besides, is specially and additionally enjoined by sec. 3186, Stats. (1898).

It seems to us obvious that the definement of the parties' rights by a decree in equity is essential to anything like a complete re-establishment of the *status quo,* and that no mere recovery at law of either damages or the possession of the land subject to the right of way can be full adequate relief. We agree with the trial court that by reason of the failure and inability of the railroad company to convey to the plaintiffs a clear and unquestionable title to the lands on the west side of the right of way, the plaintiffs had a right to rescind the contract and did effectively exercise that right, except that they could not remove its effect as a consent to the occupation of the proposed right of way by the railroad, from which must result, of course, the continuance of that occupation and the resulting duty to make compensation in the manner prescribed by sec. 1852, Stats. (1898). This we understand to be the effect of the judgment entered by the circuit court, although not therein fully expressed.

By the Court.—Judgment affirmed.

STEVENSON, Respondent, vs. MILWAUKEE COUNTY, Appellant.

May 12—June 3, 1909.

Courts: Inherent powers: Appointments: Necessary attendants: Determination of necessity: Discretion: Compensation of special attendants.

1. The power to appoint necessary attendants upon the circuit court is inherent in that court in order to enable it to properly perform the duties delegated by the constitution, and is recognized by sec. 2431, Stats. (1898), as amended by ch. 224, Laws of 1903.
2. In the exercise of its inherent power to appoint necessary attendants it is for the presiding judge of the circuit court to determine the necessity. In that respect he is vested with a broad and liberal discretion.
[3. Whether the power of such judge in determining the necessity of appointment of attendants is subject to review in any case, not decided.]
4. Where it seems necessary a circuit judge may appoint a court attendant in addition to the sheriff and his deputies for such time as the necessity exists, notwithstanding the statutory authority given the sheriff to appoint special deputies under a special order of such judge authorizing an additional number of deputy sheriffs.
5. The compensation of necessary attendants appointed by the circuit judge is the *per diem* allowed deputy sheriffs for the time expended during sessions of the court, to be recovered by certification in the same manner as fees of jurors are paid.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: GEO. W. BURNELL, Judge. *Reversed.*

The plaintiff filed with the county board two claims against the county of *Milwaukee* aggregating $749.99 for services as bailiff from August 1, 1907, to May 1, 1908, in branch 1 of the circuit court for Milwaukee county. The county board disallowed the claims and plaintiff appealed to the circuit court, and the court found as follows:

That *William Stevenson* was duly appointed by the circuit

court for Milwaukee county to serve as bailiff and attendant upon branch 1 of said court on the 29th day of March, 1907, and has since been likewise duly appointed to said position for every succeeding term of said court; that he, having duly qualified, has, since said appointment, performed the services of such bailiff and court attendant properly and faithfully and to the satisfaction of the judge of said court at all times since his original appointment; that the circuit court for Milwaukee county and the judges thereof had on March 29, 1907, and at all times since said date have had, power to appoint such court attendants to aid in the administration of justice as they might deem necessary, and that the county of *Milwaukee* was and is liable for a reasonable compensation for the services of such appointees as said court may have made; that the appointment of *William Stevenson* to said office of bailiff and court attendant and the performance by him of his duties as such court officer were not invasions of the rights or official prerogatives of the sheriff of *Milwaukee* county in the premises; that the said *Stevenson* received compensation from the county of *Milwaukee* by virtue of authority from the board of supervisors of said county for his said services as bailiff and attendant upon branch No. 1 of the circuit court for *Milwaukee* county for the first four months of his said services, to wit, from April 1 until July 31, 1907, at the rate of $1,000 per year; that said services of said *Stevenson* were and are reasonably worth the sum of $1,000 per year; that *William Stevenson* duly filed in the manner prescribed by law on April 10, 1908, a verified claim for services as bailiff as aforesaid for a period of eight months from August 1, 1907, to April 1, 1908, in the amount of $666.66, and on May 1, 1908, a further claim for his said services for the month of April, 1908, in the sum of $83.33, both of which claims were disallowed by the county board of *Milwaukee* county at a regular meeting thereof held June 2, 1908; that the two claims of *William Stevenson* for services disallowed

by the county board which formed the basis of the appeal herein were reckoned upon a basis of compensation at the rate of $1,000 per year.

And the court concluded thereon: That the county of *Milwaukee* is indebted to said *William Stevenson* for his services as bailiff and attendant upon branch No. 1 of the circuit court for *Milwaukee* county for the period beginning August 1, 1907, to and including August 1, 1908; that the two claims for services as bailiff and attendant upon branch No. 1 of the circuit court of Milwaukee county, dated, respectively, April 10, 1908, and May 1, 1908, for the amounts, respectively, $666.66 and $83.33, were lawful and proper claims against the county of *Milwaukee* and were improperly disallowed by the county board of *Milwaukee* county; that *William Stevenson* is entitled to judgment against the county of *Milwaukee* in the sum of $749.99, together with interest from June 2, 1908, at six per cent. per annum, and taxable costs herein. Judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *A. C. Backus,* district attorney, and *Norman L. Baker,* assistant district attorney, and oral argument by *Mr. Baker.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *T. W. Spence.*

KERWIN, J. On the 30th day of March, 1907, and two days before the commencement of the April term of the circuit court for *Milwaukee* county, L. W. HALSEY, circuit judge, made the following order:

"By virtue of the authority vested in me by sec. 2431 of the Revised Statutes of Wisconsin, as judge of the circuit court of *Milwaukee* county, branch No. 1, I hereby constitute and appoint *William Stevenson* as bailiff and attendant upon branch No. 1 of the circuit court of *Milwaukee* county for and during the April term thereof.

"LAWRENCE W. HALSEY, Circuit Judge."

Similar orders of appointment for subsequent terms were made, and, as will be seen from the statement of facts, the court below allowed the plaintiff compensation at the rate of $1,000 per year for services as court attendant under the appointment. Authority to make the appointment is questioned by the appellant, *Milwaukee* county, and mainly upon the ground that the judge did not find or determine that a necessity existed for such appointment. It is claimed that, because the sheriff of the county appointed two deputies to attend on the court presided over by Judge HALSEY, no other attendant was necessary, and therefore the judge had no power to make the appointment.

We shall not enter into any extended discussion of the power of circuit judges to appoint attendants, because it seems to be well settled that the power exists in proper cases. Under the constitution of this state the judicial powers of the state in matters of law and equity are vested in a supreme court, circuit courts, and other courts provided for in that instrument. The circuit courts of this state, therefore, are created by the constitution and do not depend solely upon statute for their powers. Independent of statute such constitutional courts have inherent power to make such rules and orders as may be necessary to properly perform their functions.

"They shall also have the power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions." Sec. 8, art. VII, Const.

The power to appoint necessary attendants upon the court is inherent in the court in order to enable it to properly perform the duties delegated to it by the constitution. This power has been recognized by the legislature in sec. 2431, Stats. (1898), as amended by ch. 224, Laws of 1903, which reads as follows:

"The judges of the circuit court may prescribe all such rules of practice and rules to regulate their proceedings and facilitate the administration of justice as they may deem necessary, not inconsistent with law or the rules of practice prescribed by the justices of the supreme court. Any officer of the court or court attendant who may be appointed by the judge of any circuit court, shall have the same powers and authority in court, during each session thereof, as the sheriff of the county."

This section by necessary inference recognizes power in the circuit courts to appoint attendants, and the members of this court so held at an early day. Speaking through Chief Justice DIXON the members of this court said:

"It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants, and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business that it may be looked upon as very doubtful whether the court can be deprived of it. As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of either of those departments." *In re Janitor of Supreme Court,* 35 Wis. 410; *Crawford Co. v. Le Clerc,* 3 Pin. 325; *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475.

Other courts have announced the same doctrine. *State ex rel. Hovey v. Noble,* 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101; *State ex rel. Douglas v. Westfall,* 85 Minn. 437, 89 N. W. 175; *In re Court Officers,* 3 Pa. Dist. Rep. 196; *Board of Comm'rs v. Stout,* 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398; *Ex parte Kellogg,* 6 Vt. 509.

As we understand the appellant's contention, the power to appoint necessary court attendants is not seriously denied, but

it is insisted that the necessity did not arise in this case. The power to determine the necessity must rest somewhere, and no place, we think, more appropriately than with the judge making the appointment, for it is for him to determine when a necessity exists in the administration of the business of his court; and it necessarily follows from the nature of the case that a broad and liberal discretion is vested in the judge respecting this power. Whether the power of the judge in determining the necessity is subject to review in any case, and, if so, in what manner and under what circumstances, we need not and do not decide, because in the case before us the record shows no abuse of power by the judge in making the appointment.

Some contention is made that the prerogative of the sheriff was infringed by the judge in appointing an attendant vested with the power of a deputy sheriff, but this by no means follows from the record. On the contrary, it appears that the presence of the sheriff in court and participation within the scope of his right to act, either by himself or his deputy, was not interfered with. We think it clear that where it seems to the judge necessary that an attendant upon the court, in addition to the sheriff and his deputies, should be appointed, it is his right to make the appointment for such time as the necessity exists.

Our attention is called to sec. 725, Stats. (1898), which makes it the duty of the sheriff to attend upon the circuit court during its session and file a list of his deputies, not exceeding three; but this provision does not deprive the judge, in case a necessity exists, of the power of appointing an attendant upon the court. When that necessity exists must be determined by the judge of the court in which the appointment is made. Subd. 3, sec. 725, Stats. (1898), provides that the sheriff shall attend upon the circuit court during its sessions and file a list of his deputies, who are to receive a *per diem* for attendance on court, and further that the court

may by special order authorize a greater number of deputies to attend when the court shall be engaged in the trial of any person charged with crime; and sec. 2431, Stats. (1898), as amended by ch. 224, Laws of 1903, provides that the person appointed by the judge shall have the same powers and authority in court during its session as the sheriff of the county. If the court or judge had attempted to interfere with the constitutional or statutory powers of the sheriff, a different question would be presented.

The court below allowed a recovery by the plaintiff on the basis of $1,000 per year upon the ground that this amount was reasonable pay for the plaintiff's services. Of course the general rule is well understood that where fees of an officer are fixed by statute no other compensation can be recovered. *Crawford Co. v. Iowa Co.* 2 Pin. 368; *Portage Co. v. Waupaca Co.* 15 Wis. 362; *St. Croix Co. v. Webster,* 111 Wis. 270, 87 N. W. 302; *Douglas Co. v. Sommer,* 120 Wis. 424, 98 N. W. 249. Sec. 733, Stats. (1898), provides specifically how fees for attendance required by law on any court shall be paid out of the treasury of the county "in the same manner as the fees of jurors attending such courts are to be paid." Subd. 22, sec. 731, provides that the necessary deputies shall receive for attendance on the circuit court $2 a day, to be paid out of the county treasury. It follows that the fees of necessary attendants appointed to attend upon court shall be the *per diem* allowed deputy sheriffs for the time expended during the sessions of the court. This compensation can be recovered only in the manner provided by the statutes, namely, by certification in the same manner as fees of jurors are paid. This seems to follow from the statutes and decisions of this court. Secs. 733, 2560, Stats. (1898); *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460; *Oneida Co. v. Tibbits,* 125 Wis. 9, 102 N. W. 897; *Philler v. Waukesha Co.* 139 Wis. 211, 120 N. W. 829.

It does not appear from the record just what the certifica-

tion was, since the certificates do not appear; but the statement in the bill of exceptions must be regarded as a verity, and from this it does not appear that there was certification for all the time claimed. It appears from the record that the plaintiff was paid for all services up to July 31, 1907, and that in this action the certification only shows attendance from July 1, 1907, to January 28, 1908. Besides, the services were allowed at the rate of $1,000 per year. It may be that upon another trial the plaintiff may be able to show that his claim was properly verified for the time allowed as required by sec. 2560, Stats. (1898), and, if so, he will be entitled to recover the *per diem* allowed by statute to deputy sheriffs for attendance upon the sessions of the circuit court for such time as he attended. It follows that there must be a new trial.

By the Court.—The judgment of the circuit court is reversed and the cause remanded for a new trial.

MARSHALL, J. (*dissenting*). I do not think *In re Janitor of Supreme Court,* 35 Wis. 410, 419, should cut any figure in the decision of this case. No provision was made by the written law for an attendant upon this court, so resort was had to the inherent power mentioned, the necessity being unquestionable. Neither do I think sec. 2431, Stats. (1898), as amended by ch. 224, Laws of 1903, should cut any figure, except in so far as it recognizes an inherent power of appointment to be exercised in case of necessity, considering the written law making quite remote any such event.

As to circuit courts the power of appointment of court attendants in the ordinary is in abeyance because the legislature, manifestly, has so willed. It has provided for such attendants and their compensation and manner of payment. Subd. 3, sec. 725, Stats. (1898), provides that the sheriff of each county shall attend the sessions of the court therein with his deputies to the number of not to exceed three, who shall receive a *per diem* for each attendant, and that, by special

order, the court may authorize a greater number of deputies when it shall be engaged in the trial of any person charged with a crime. Subd. 22, sec. 731, Stats. (1898), provides that a deputy, in attending court, shall receive compensation at the rate of $2 per day for each day, to be paid out of the county treasury. Sec. 733, Stats. (1898), provides that all such fees shall be paid out of the county treasury of the county wherein such service shall have been rendered in the same manner as fees of jurors attending such court are to be paid. Sec. 2560, Stats. (1898), provides that at the end of every term of a circuit court or within ten days thereafter the clerk of the court shall give to each juror a certificate of the number of days attended by him upon the court; that the juror shall receipt therefor before delivery thereof to him, and that the county treasurer shall pay the amount due to him.

Thus it will be seen, the written law amply provides for circuit court attendants, except in emergency cases of a temporary character, the appointing power being lodged in the sheriff; also amply provides for payment of such attendants at a specified amount for each day's actual attendance upon a session of court, and provides for an auditing officer, to wit, the clerk of the court, as regards the number of such days' attendance, and makes it mandatory on the county treasurer to recognize such audit by paying every holder of the required evidence of attendance $2 per day. Neither the circuit judge nor the county board has any duty whatever in respect to the matter, except, doubtless, the former should supervise the clerk in respect to performance of his duty.

Can there be any doubt but that, in view of the situation stated, the legislative idea is that the matter of court attendants and payment thereof shall be governed by the written law so far as possible. It may well be that courts are not obliged to bow to the legislative will in such matters, but they ought to in all cases where their constitutional authority is

not prejudicially interfered with. The written law does not leave any occasion for use of the court's inherent power, except in purely emergency cases, and it is manifest that no such case existed in the instance before us. When the legislature, without prejudicially trenching upon judicial power, has lodged jurisdiction over a particular matter completely elsewhere than where it has commonly been exercised, with reasonable expectation that the new instrumentality will adequately deal with such matter, though such power, if lodged in the court by the organic law, could not be prejudicially taken away, if there is no good reason why the court should not regard itself substantially superseded in such matter, it should do that, and its failure in that respect should be viewed as jurisdictional error. *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304.

The opinion of the court goes upon the ground that the appointment in question was made to meet a necessity, but it seems the conception of necessity fails to give due significance to the ample provision for court attendants in the written law, and to appreciate that there cannot well be any necessity for a judicial appointment except in case of the number of deputies competent for the sheriff to appoint being insufficient, or refusal on his part to appoint competent persons. I understand there was nothing of the kind in this case. The learned circuit judge evidently supposed that since court attendants generally are needed, that was all the necessity required to enable him to make such appointment, while, in fact, the further element of refusal or inability of the sheriff to furnish the necessary attendants was required. In my judgment, the appointment in this case, since the sheriff stood ready to furnish a proper attendant, was akin to usurpation.

I, of course, agree that, in any event, the appointee is only entitled to compensation at the rate of $2 per day. However, the opinion of the court fails to make plain that, assuming the respondent to be entitled to pay at the rate of $2 per day for

the numbers of days he actually attended sessions of the court, the county board has nothing to do with the matter. The whole proceeding of presenting the claim to such board for allowance was wrong and the reversal and remand for a new trial, as it is liable to be understood, *i. e.* that respondent can recover on such trial for such days' attendance as may be certified under sec. 2560, Stats. (1898), in my opinion is wrong. No action of this nature is necessary or proper. The county board has no jurisdiction of the subject matter, therefore the circuit court did not obtain any. The cause should be remanded with directions to dismiss with costs, but without prejudice to respondent's obtaining a certificate from the clerk of the circuit court of the number of days he actually attended upon sessions of the court, as shown by the court journals, and obtaining thereon of the county treasurer $2 for each such day. Under the decision it is the duty of such clerk to give such certificate, and *mandamus* is the remedy for refusal. Upon presentation of such certificate to the county treasurer it will be his duty to pay as aforesaid, and *mandamus* is the remedy for refusal. The written law, as we have shown, in unmistakable terms, provides for payment of court attendants in that manner and such manner is exclusive. That is the effect of *Oneida Co. v. Tibbits,* 125 Wis. 9, 102 N. W. 897, and *Philler v. Waukesha Co.* 139 Wis. 211, 120 N. W. 829, if there is any ambiguity in the matter. The county board has no more to do with the subject than it has with the payment of jurors, state witnesses, court reporter, or the judge himself.

CAWKER and others, Executors, etc., Respondents, vs. CENTRAL BITULITHIC PAVING COMPANY, imp., Appellant.

May 12—June 3, 1909.

Pleading: Demurrer: Constitutional law: Special laws: Defective municipal contract: Curative act: Ratification by municipality: Action: Quantum meruit.

1. Where a taxpayer has brought an action against a city and a paving contractor to enjoin the collection of the contract price, an affirmative claim set up by the contractor by cross-complaint against the city for a recovery on implied assumpsit, if sustained, defeats the taxpayer's action, and hence he may challenge the legal sufficiency of the cross-complaint on demurrer.
2. Ch. 677, Laws of 1907, purporting to validate certain classes of paving contracts theretofore made by "any municipal corporation of the first class," relates to the city of Milwaukee, which is the only city then or ever theretofore in the first class of cities by legislative classification according to population, and relates wholly to past conditions. It is therefore a special law amending the charter of that city and within the condemnation of secs. 31, 32, art. IV, Const.
3. Where a municipal paving contract is invalid for failure to comply with charter requirements, the city cannot thereafter validate it by ratification without compliance with such charter provisions.
4. Where a street-paving contract is void for failure to comply with charter provisions, the contractor cannot go on and complete it and recover upon *quantum meruit*.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the supplemental answer, counterclaim, and cross-complaint of the appellant.

For the appellant there was a brief by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *James G. Flanders* and *J. M. Head,* of counsel, and oral argument by *Mr. Flanders.*

Among other references upon the part of the appellant were the following: Secs. 18, 31, art. IV, Const.; *Adams v. Beloit,*

105 Wis. 363, 81 N. W. 869; *Warner v. Knox,* 50 Wis. 429, 7 N. W. 372; ch. 322, Laws of 1875; *Cawker v. Cent. B. P. Co.* 133 Wis. 29, 34, 113 N. W. 419; *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603; *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270; *Evans-Snyder-Buel Co. v. McFadden,* 105 Fed. 293; *Stevens Point B. Co. v. Reilly,* 44 Wis. 295; *Thomson v. Elton,* 109 Wis. 589, 85 N. W. 425; *McGillivray v. Joint School Dist.* 112 Wis. 354, 88 N. W. 310; *Rice v. Ashland Co.* 114 Wis. 130, 89 N. W. 908; *Schneider v. Menasha,* 118 Wis. 298, 95 N. W. 94; *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132; *Martin v. Fond du Lac Co.* 127 Wis. 586, 106 N. W. 1095; *Appleton W. Co. v. Appleton,* 132 Wis. 563, 113 N. W. 44; *Lawrence v. Milwaukee,* 45 Wis. 306.

For the respondents there was a brief by *Ryan, Ogden & Bottum,* and oral argument by *L. M. Ogden.*

Among other references upon the part of the respondents were the following: Ch. 677, Laws of 1907; *Allen v. Milwaukee,* 128 Wis. 678, 106 N. W. 1099; *Ledebuhr v. Wis. T. Co.* 115 Wis. 214, 91 N. W. 1012; *Bostwick v. Mut. L. Ins. Co.* 122 Wis. 323, 99 N. W. 1042; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 95, 99 N. W. 603.

TIMLIN, J. The plaintiffs, executors and trustees under the will of E. H. Cawker, deceased, as resident taxpayers of the Sixteenth ward of the city of Milwaukee, brought this suit on October 26, 1906, against the city of Milwaukee, certain of its officers, and the appellant, to enjoin the city and these officers from accepting certain street-paving work done by appellant, from countersigning or paying over to appellant any city order or orders in payment for such work, and to have the contract for such work between appellant and the city adjudged void. This complaint was upheld against demurrer of the appellant in *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417. The appellant answered this complaint, and this answer contained what the pleader called a counter-

claim against the plaintiffs, and a cross-complaint against the city and its officers, and, among other forms of relief, demanded that the city authorities be required to make a reassessment in case the original special assessment was held void. There was a general demurrer by the plaintiffs, which was overruled by the decision of this court in *Cawker v. Cent. B. P. Co.* 133 Wis. 29, 113 N. W. 419, holding that the cross-complaint made a valid showing entitling the appellant to a reassessment, but not passing upon other claims of the pleader, under the rule that if one good cause of action or defense be found in the pleading a general demurrer thereunto must be overruled. Instead of proceeding to a reassessment, the appellant, after the cause was remitted to the circuit court, pleaded what it termed "a fourth and further answer and defense to the complaint in this action and . . . a counterclaim against the plaintiffs, and . . . a cross-complaint against the city of Milwaukee" and its officers. The chief point in this supplemental pleading was that the paving contract in question was by a curative statute (ch. 677, Laws of 1907, published July 18, 1907) validated, ratified, and confirmed by the legislature. By a "fifth cause of action and by way of counterclaim and cross-complaint, and also by way of answer and defense to the complaint in this action," the appellant sought to recover from its codefendant, the city of Milwaukee, the reasonable value of the material and labor expended in good faith and at the instance and request of the city in paving the street in question. The prayer following these two pleadings is that the complaint be dismissed, the paving contract be declared affirmed and validated by ch. 677, Laws of 1907, and the city authorities authorized to pay for the work as provided in the contract; but if the contract is not thus validated and affirmed, that the appellant recover judgment against its codefendant, the city, for the reasonable value aforesaid, less payments credited thereon. To this pleading the plaintiffs demurred on the ground that the same

did not state facts sufficient to constitute a defense to the action or a counterclaim against the plaintiffs. The demurrer was sustained and the case is brought here as stated.

The unusual situation of the plaintiffs with respect to this amended pleading is quite apparent, but, looking to the substance, anything in the nature of an affirmative claim by the appellant against its codefendant, the city, which would entitle the appellant to a recovery on this contract or on such matters growing out of this contract against the city, must certainly defeat the taxpayers' action to restrain such payment, and the plaintiffs may, treating such matters as a defense to their cause of action, challenge the legal sufficiency of such pleading on demurrer.

It is quite apparent that this new pleading raises only two points: (1) Is the curative statute (ch. 677, Laws of 1907) a valid law? (2) Can a contractor, after having entered into a contract in writing with a city, invalid because failing to comply with charter provisions designed to secure competition, after completing the paving work described in such contract, and after the acceptance of such work by the city, recover upon implied assumpsit the reasonable value of the work and materials done and placed in the street? The constitution of this state (art. IV, secs. 31, 32) forbids the enactment of any special law to amend the charter of a city, and requires the legislature to provide general laws for "the transaction of any business" thus prohibited, and requires that such general laws be uniform in their operation throughout the state. The curative act in question applies "in all cases where any municipal corporation of the first class in this state shall have heretofore entered into any contract or contracts with any person, firm or corporation for the construction of any pavement or pavements, which contract or contracts are illegal because requiring the use of patented materials in whole or in part," etc. Milwaukee is the only city which now is, or which ever in the past has been, in this

first class according to legislative classification by population. The act, relating wholly to past conditions, is therefore special, as much so as if the city of Milwaukee were expressly named therein. *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603. It is argued that this makes impossible the enactment of curative statutes relating to municipalities. But we do not see that any such result follows. We must hold that the curative statute in question is unconstitutional and void.

The contract between the appellant and the city was expressly adjudged to be invalid in *Cawker v. Milwaukee,* 133 Wis. 35, 113 N. W. 417, for failure to comply with the charter provisions relating to contracts for the use of patented articles. These provisions were intended to secure and make effective competition between bidders. To now hold that the city might, without compliance with such provisions, ratify the contract and so validate it, or that the appellant might, notwithstanding the invalidity of the contract on this ground, go on and complete it and recover upon *quantum meruit,* would be to make these charter provisions practically ineffective. Former decisions of this court forbid such recovery by the appellant. *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603, and cases cited in opinion; *Appleton W. Co. v. Appleton,* 132 Wis. 563, 113 N. W. 44. The order sustaining the demurrer must be affirmed.

By the Court.—It is so ordered.

WITT, Respondent, vs. MERZ, imp., Appellant.

May 12—June 3, 1909.

Appeal and error: Review: Findings of referee, when disturbed.

Where there is evidence to support the findings of a referee, confirmed by the trial court, they will not be set aside on appeal unless the clear preponderance of the evidence is against them.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Edgar L. Wood* and *Christian Doerfler,* and for the respondent on that of *Charles J. Weaver.*

BARNES, J. This action is brought by a subcontractor to foreclose a claim for a mechanic's lien. The case was referred, and the findings of fact and conclusions of law made and found by the referee were confirmed by the court. This appeal is taken to review the correctness of two of the findings of fact.

The referee found that the last work performed by the plaintiff upon the building which he constructed was done on November 13, 1905. The defendant Komorowski, the owner of the building, offered evidence to show that the last date upon which work was performed was November 4, 1905. The notice provided for by sec. 3315, Stats. (1898), was served on January 9, 1906. It is manifest that if the last work was performed as early as November 4th the plaintiff had lost his right to a lien by reason of the fact that more than sixty days had elapsed after the work was done and before the required notice was served upon the owner. The testimony seems to preponderate in favor of the contention of the appellant upon the question. There is, however, considerable evidence in the record to support the finding of the referee, and we do not think the testimony so clearly preponderates against his finding as to warrant this court in setting it aside. The referee had the advantage of seeing the witnesses, and should be in a better position to pass upon their credibility than this court is.

Certain payments were made by the principal contractor to the plaintiff while the latter was engaged in building the house of the defendant Komorowski, and it is urged that it was error not to apply such payments, or at least a portion

of them, on the indebtedness due from the principal contractor to the subcontractor on account of the Komorowski house. The evidence to show that these payments were made on account of other jobs which the plaintiff was performing for the principal contractor is sufficient to sustain the finding of the referee.

By the Court.—Judgment affirmed.

MARIEN and others, Respondents, vs. EVANGELICAL CREED CONGREGATION OF MILWAUKEE and others, Appellants.

May 12—June 8, 1909.

(1) *Supreme court: Restraining acts of party pending appeal.* (2) *Religious societies: Diversion of property to other uses: Rights of members: Enforcement.*

1. The supreme court will not by order restrain an appellant from doing certain acts pending the appeal when such acts are as completely prohibited by the judgment appealed from as they would be by such an order and the restraining effect of the judgment has not in any way been restricted or modified.
2. Where property has been acquired, whether by gift or purchase, for the maintenance and support of the faith of a recognized denomination or church, every member of the association acquiring it may resist its diversion to other antagonistic uses, whether secular or religious, and the courts will protect and enforce the trust to apply it to the uses for which acquired and not to inconsistent uses.

APPEAL from a judgment of the circuit court for Milwaukee county: E. B. BELDEN, Judge. *Affirmed.*

The facts are stated in the opinion.

On January 29, 1909, there was a motion by the respondents for an order restraining and enjoining defendants from disposing of or interfering with the custody of a certain fund belonging to defendant congregation, and from mortgaging

or in any way disposing of any of its property until the determination of the appeal.

F. X. Boden, for the motion.

H. F. Cochems, contra.

The following opinion was filed January 30, 1909:

PER CURIAM. The respondents' motion for an order restraining the appellants from doing certain specific acts must be denied, because there is no showing in the records and affidavits, taken together, of any necessity therefor. The judgment restrains the appellants in very broad and general terms from any misappropriation of any property of the corporation while their official position gives them the opportunity to control it. There is nothing in the record to indicate that the restraining effect of that judgment has been restricted or modified in any way pending the appeal, nor does any reason appear why any misappropriation or misuse of such property would not constitute a contempt punishable at once as such. The acts alleged by affidavits to be threatened, if they constitute unlawful diversion or misappropriation of any assets belonging to the corporation, are therefore as completely prohibited by the judgment itself as they would be by any order which we might make.

The cause was argued on May 12, 1909.

For the appellants there was a brief by *Kanneberg & Cochems,* and oral argument by *A. Kanneberg.*

For the respondents there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

The following opinion was filed June 3, 1909:

WINSLOW, C. J. This is an action in equity, brought by certain members of a church congregation against the church corporation, its pastor and trustees, to prevent the changing of the creed of the organization and the perversion of the corporate property by using it for the spreading of religious

doctrines and tenets hostile to those to which the property was dedicated by the founders of the church. The complaint was before this court upon demurrer in *Marien v. Evangelical C. Cong.* 132 Wis. 650, 113 N. W. 66, where it was sustained. It does not seem necessary here to restate its allegations. Reference may be made to that case for further information as to the claims of the complaint. The defendants answered to the merits, and a trial has been had resulting in findings and judgment for the plaintiffs, and the defendants appeal.

The findings were to the effect that the church was organized in September, 1897, as a German Evangelical church or congregation, and formally joined the Wisconsin District of the German Evangelical Synod of North America in June, 1899; that difficulties concerning church discipline arose between the officers of the said Wisconsin District and Rev. *Franz Kupfer,* pastor of the church, in June, 1904, which resulted in *Mr. Kupfer's* joining the Evangelical Lutheran Synod of Wisconsin; that thereafter said *Kupfer* began using the catechism, ritual, forms, and ceremonies of the Evangelical Lutheran Synod and adheres to that faith; that there are serious and fundamental differences between the faith of the German Evangelical Synod and the faith of the Evangelical Lutheran Synod; that the pastor and officers of the church have repudiated the first-named faith and have attempted to adopt the last-named faith and thus divert the property of the congregation to uses different from and hostile to those of the German Evangelical Synod; that the plaintiffs, who desire to retain the original faith, are entitled to an injunction preventing any such change of faith and preventing the perversion of the church property to the spreading of other doctrines than those to which it was dedicated, and also preventing *Mr. Kupfer* from preaching the doctrines of the Lutheran Synod in said church, or any doctrines at variance with the doctrines of the Evangelical Synod, or acting as pastor until he again

becomes a member in good standing of the German Evangelical Synod. The judgment followed the findings.

The trial of the case was very long, and the evidence, even when printed, covers more than 500 pages. Nearly every finding of fact which is of any importance in the case is attacked by the appellants, who have furnished us a brief of more than 100 pages. Many pages might be written in discussing the facts and the sufficiency of the evidence to support the findings of the trial judge, but it is not perceived how such a course would add anything useful to the vast volume of case law which is now being sent forth annually to burden the shelves of a long-suffering profession. Nor do we feel that we have any special qualifications which would enable us to discuss illuminatingly the fine-drawn doctrinal distinctions which separate the two faiths.

There were two fundamental and controlling questions here: *First,* was the church at its foundation devoted by its founders to the dissemination of the doctrines of one certain faith or sect? and *second,* are the pastor and the trustees endeavoring to use the church property for the support of another and different faith? The trial judge resolved both of these questions in the affirmative, and from an examination of the case we are convinced that the testimony amply sustains the findings. The legal result from these facts is not in doubt. As said in the opinion upon the demurrer in the present case (132 Wis. 650, 652, 113 N. W. 66, 67):

"When property has been acquired, whether by gift or purchase, for the maintenance and support of the faith of any recognized denomination or church, every member of the association acquiring it, corporate or unincorporated, has a right to resist its diversion to other antagonistic uses, whether secular or religious, and therefore those who hold the title or control, whether a corporation or the officers of an association, hold it charged with a trust to apply it to the uses for which acquired and not to inconsistent ones. Such trusts the courts will protect and enforce."

By the Court.—Judgment affirmed.

CITY OF MILWAUKEE, Appellant, vs. McGREGOR and others, Respondents.

May 12—June 3, 1909.

Statutes: Prohibitions: Operation on the state: Title to state property: Erection of buildings by state boards: Municipal regulations: Building permits.

1. Statutes in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests.
2. General prohibitions in general laws, or in a city ordinance made pursuant to general charter authority, apply to all private parties but are not rules of conduct for the state.
3. The state may have the benefit of general laws but is not adversely affected by any unless it is so expressly provided.
4. A state board empowered to take and hold the title to property for state purposes does not own such property in any proprietary sense,—it is state property, to all intents and purposes, the same as in case of title thereto being formally vested in the state.
5. In case of the construction of a building by a state board for state purposes under state authority the matter is wholly of state concern and not under any general state or municipal regulation.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Equitable action by the plaintiff, upon complaint of its building inspector, against the members of the Board of Normal School Regents of the State of Wisconsin, their contractors and architect, to prevent continuation of the erection of a normal school building in the city of *Milwaukee,* which had been partially constructed by them, upon the ground that a building permit had not been obtained from complainant pursuant to the ordinances of said city, without which such erection was claimed to be unlawful. A temporary injunction was duly obtained. On motion it was dissolved, the action dismissed, and judgment rendered accordingly, upon the ground that it conclusively appeared from the complaint and

other papers in the case that the structure which defendants were erecting was for the state of Wisconsin under express legislative authority, and that the ordinances of the city of *Milwaukee* had no application to the case.

Ch. 175, Laws of 1905, and ch. 505, Laws of 1907, empowered the Board of Normal School Regents to erect a normal school building in the city of *Milwaukee* according to plans adopted by such board and approved by the governor. It appeared that the building in question, at the time of the commencement of this action, was, as claimed, in process of being erected under such authority and that all of the conditions precedent to such erection, prescribed by such authority, had been fully complied with.

For the appellant there was a brief by *John T. Kelly,* city attorney, and *Walter H. Bender,* assistant, and oral argument by *Mr. Kelly.*

For the respondents there was a brief by the *Attorney General* and *A. C. Titus,* assistant attorney general, and *Theodore Kronshage, Jr.,* of counsel, and oral argument by *Mr. Titus* and *Mr. Kronshage.*

MARSHALL, J. The only question requiring solution upon the appeal is this: Do the provisions of a city charter, and ordinances duly adopted pursuant thereto, regulating the construction of buildings in such city, apply to a public school building proposed to be erected or in process of erection for the state by the Board of Normal School Regents, under special legislative authority to erect the same according to plans adopted by it and approved by the governor? If not, the judgment appealed from is right.

Counsel for appellant present the case as if the Board of Normal School Regents is to be treated the same as an individual, acting for himself or for a private corporation, which is manifestly wrong. The building in question is for the public use as state property. The situation is the same as if

the structure was to be used for the care of the insane or for any other of the many state purposes which might be named. The fact that the board is made a state agency to take and hold title to property for state purposes does not cut any figure in the matter. The building is not designed to be, in any proper sense, the property of the board, except as representing the state.

So the question comes down to whether the ordinary charter and ordinance regulations of a city requiring submission to local supervision, as regards the manner of constructing, altering, and repairing buildings, have any application to state buildings. That must be answered in the negative. It is plainly so ruled by the familiar principle that statutes, in general terms, do not apply to acts of the state. Moreover, express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith. *Sandberg v. State,* 113 Wis. 578, 89 N. W. 504; *Dollar Sav. Bank v. U. S.* 86 U. S. 227, 239; *U. S. v. Verdier,* 164 U. S. 213, 219, 17 Sup. Ct. 42; *Dist. of Columbia v. Johnson,* 165 U. S. 330, 17 Sup. Ct. 362.

The infirmity of appellant's position has been, from the first, in supposing that the state, in respect to constructing a building in the city of *Milwaukee,* has no more free hand than a private person or corporation, while the fact is that the people of the state, in their sovereign capacity, except as restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his sovereign prerogatives as "universal trustee" for his people. So it has been said, "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not" the sovereign "in the least, if they may tend to restrain or diminish any of his rights and interests." So general prohibitions, either express or implied, apply to all private parties, but "are not rules for the conduct of the state."

Dollar Sav. Bank v. U. S., supra. That has been applied in many ways. For examples: The state may sue as freely as an individual, but cannot be sued except by its consent. It may have the benefit of a general cost statute, but it is not liable for costs without express written law to that effect. It may plead the statutes of limitations the same as an individual, or recover interest as use or damages, but is not subordinate in adversary proceedings to the law on either subject, unless expressly named therein showing unmistakable legislative intent to that effect.

Applying the foregoing, it is plain, that the assumption by the building inspector of the city of *Milwaukee* of authority over the state agent in the execution of the statutory command to build the structure in question according to plans approved by the governor, was an unwarranted interference—a pure, but not intentional, of course, usurpation. The state was not only not expressly included in the charter power of regulation, but the general law of the state passed subsequently to the enactment of the charter quite plainly commanded the Board of Regents to erect the building without regard to the judgment of any one outside of its own members, except as to approval of the plans by the governor.

By the Court.—The judgment is affirmed.

STATE EX REL. NOWOTNY, Respondent, vs. CITY OF MILWAUKEE and another, Appellants.

May 12—June 3, 1909.

Health: Health officers: Necessary powers: Municipal corporations: Police power: Delegation to health officer: Licensing sales of milk: Revocation of license.

1. Health officers who are expected to accomplish results must necessarily possess large powers and be endowed with the right to take summary action, which at times trenches closely upon despotic rule.

2. Executive boards and officers who can deal at once with emergencies under general principles laid down by the lawmaking body must exist if the public health is to be preserved.
3. Under charter authority to tax, regulate, and restrain vendors of milk and to regulate and restrain the sale of milk, a common council has power to pass an ordinance vesting the power of issuing and revoking licenses in the city health officers, with the right to exercise the power of revocation summarily and even without notice. Language in *State ex rel. Sepic v. Milwaukee*, 129 Wis. 562, that the words "regulate" and "restrain" do not in any sense mean "revoke," considered and overruled.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellants there was a brief by *John T. Kelly,* city attorney, and *Clinton G. Price,* assistant city attorney, and oral argument by *Mr. Price.*

Carl Runge, for the respondent.

WINSLOW, C. J. The health commissioner of *Milwaukee* granted the relator a license to peddle milk in said city for one year, the license being by its terms "subject to revocation" according to the provisions of the city ordinances. The license having been in form revoked by the health commissioner because relator had been convicted of selling impure milk, the relator brought an action of *certiorari* in the circuit court and the action of the commissioner was reversed, whereupon the city and the health commissioner appealed to this court.

The question is whether the revocation was lawful. In addition to broad general police powers, the common council of the city of *Milwaukee* had power under the city charter "to regulate and restrain the sale of . . . milk," also to "tax, license, regulate, and restrain . . . vendors of milk; to fix and regulate the amount of license under this subdivision," etc. Subds. 9 and 40, sec. 3, ch. 4, Charter of Milwaukee, being ch. 184, Laws of 1874, as amended. By ch. 13 of the charter the duties of the commissioner of health are defined and made very broad and sweeping. He is given power to

summarily abate nuisances of all kinds, destroy diseased or infected food, clothing, and other like articles, establish temporary hospitals in case of epidemics, and, in fine, to exercise very broad and autocratic powers in all matters relating to the conservation of the public health, and sec. 16 of the chapter further provides that the council may "further define" his duties and pass such ordinances in aid of his duties as may tend to promote and secure the general health of the inhabitants of the city.

A health officer who is expected to accomplish any results must necessarily possess large powers and be endowed with the right to take summary action, which at times must trench closely upon despotic rule. The public health cannot wait upon the slow processes of a legislative body or the leisurely deliberation of a court. Executive boards or officers who can deal at once with the emergency under general principles laid down by the lawmaking body must exist if the public health is to be preserved in great cities. *Lowe v. Conroy,* 120 Wis. 151, 97 N. W. 942. It is well said in *People ex rel. Lieberman v. Vandecarr,* 175 N. Y. 440, 67 N. E. 913:

"The vesting of powers more or less arbitrary in various officials and boards is necessary if the work of prevention and regulation is to ward off fevers, pestilence, and the many other ills that constantly menace great centers of population."

There is nothing of greater importance relating to the food supply of a great city than that the milk sold should be pure and wholesome, and the common council of *Milwaukee,* realizing this fact, and realizing also that it was imperative that action should be quick and decisive if it is to be efficient, passed ordinances requiring under penalties that all milk sold must be unadulterated, must meet certain standards, and be obtained from healthy cows fed upon wholesome feed, and further requiring that every milk vendor must obtain a license from the health commissioner, "which license may at any time be revoked by the commissioner of health for viola-

tion of the provisions hereof, or for any good or sufficient cause." We are convinced that the council had power to pass the ordinance and vest the power of issuing and revoking licenses in the health commissioner by virtue of the power to "tax, regulate, and restrain" the "vendors of milk," and to "regulate and restrain the sale of milk," given to it by the city charter.

The requiring of licenses and the reserving of the power to revoke such licenses, in case of misconduct or violation of law, is well recognized as one of the most effective means of regulating and restraining a business that has yet been discovered, but the power of revocation would amount to little if it could not be vested in an executive officer or board with power to act quickly. The sale of infected milk for a single hour might produce an epidemic of typhoid fever which would sweep hundreds to the grave. The importance of reserving in some executive official the power to revoke can hardly be overestimated. Prosecutions to recover fines and penalties may drag their weary lengths along for weeks and months and even then prove ineffective; but the revocation of the license remedies the evil and avoids the danger of the spreading of disease at once. It is regulation in the most effective sense. We have no hesitation in holding that when the city was given the power to license, restrain, and regulate the sale of milk it also took power to revoke licenses, and that it might vest such power in the health commissioner with the right to exercise the same summarily and even without notice. McQuillan, Mun. Ord. § 420, and cases cited; *Child v. Bemus,* 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57.

It is only fair to say that this court seems in a measure to blame for the erroneous ruling made by the trial court. In the case of *State ex rel. Sepic v. Milwaukee,* 129 Wis. 562, 109 N. W. 421, it was said that the words " 'regulate' and 'restrain' do not in any sense mean revoke." That case involved the power of the council to delegate to a court the

power to revoke a liquor license. The general statutes of the state having provided for the revocation of all liquor licenses in any city by the council alone, it was necessarily held that an ordinance which attempted to vest the power in a court was void because contrary to the general state law. It was entirely unnecessary to support the decision in that case by holding that the power to regulate and restrain does not include the power to revoke a license. We now deem the remark to have been ill advised and distinctly erroneous, and overrule it. The case of *Mernaugh v. Orlando,* 41 Fla. 433, 27 South. 34, which was cited in the *Sepic Case* as authority for the proposition, simply holds that the power to "regulate and restrain" saloons and beer halls does not include the power to prohibit the sale of liquors entirely in the municipality. This may be at once admitted without at all militating against the proposition that the power to "license, regulate, and restrain" does include the power to revoke an individual license for misconduct of the holder. Such an act does not prohibit the business, but regulates it in the truest sense by keeping it in the hands of law-abiding licensees.

By the Court.—Judgment reversed, and action remanded with directions to quash the writ of *certiorari.*

FERGUSON, Trustee, Respondent, vs. BAUERNFEIND, Appellant.

May 13—June 3, 1909.

Bankruptcy: Preferences: Trust funds: Appeal: Findings: Evidence: Debtor and creditor: Trustee's title to bankrupt's property.

1. Payments discharging a trust fund in the hands of one subsequently adjudicated a bankrupt cannot be recovered as preferences.
2. In an action by a trustee in bankruptcy to recover alleged preferential payments, a finding that the relation of debtor and

creditor existed between the defendant and the bankrupt is not sustained where the evidence clearly shows a trust relation by which the bankrupt took, received, and held defendant's money for the purpose of loaning it, even though he may have mingled it with his own money.

3. Under the federal bankruptcy act the trustee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time of the vesting of the trustee's title.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This action was brought by the plaintiff as trustee of the C. W. Milbrath Company, a corporation, against the defendant, *Jacob Bauernfeind,* to recover the sum of $521.25 alleged to be due and owing upon an open and running account between the C. W. Milbrath Company, a corporation, bankrupt, and the defendant. The complaint alleges, in substance, that the Milbrath Company, a corporation, was adjudged a bankrupt on the 31st day of August, 1905, and on the 4th day of October, 1905, the plaintiff was elected trustee; that on the 17th day of May, 1905, the said C. W. Milbrath Company, being insolvent and unable to pay its debts, nevertheless paid to the defendant on account of said indebtedness the sum of $221.25, and on July 5, 1905, $300; that defendant received and accepted such payment with knowledge that the C. W. Milbrath Company was insolvent; that the effect of such payments was to enable the defendant to obtain a greater percentage of his debt than that obtained by any other creditor of his class; that such payments were made with intent to hinder and delay the creditors of said C. W. Milbrath Company; that before action due demand was made.

The answer, after admitting the corporate existence of the C. W. Milbrath Company, that it was adjudged bankrupt, that plaintiff was elected trustee, and due demand that defendant return the moneys paid to him May 17 and July 5, 1905, denied the other allegations of the complaint. The answer further denied that the C. W. Milbrath Company was

indebted to the defendant upon running account, but alleged that said Milbrath Company in or about the month of May, 1905, or some time prior thereto, had received a large sum of money belonging to defendant and held the same in trust for him.

The court found that on or about the 31st day of August, 1905, the C. W. Milbrath Company, a corporation, was adjudged a bankrupt, an involuntary petition in bankruptcy having been theretofore duly filed on August 18, 1905; that on October 4, 1905, plaintiff was elected and appointed trustee of said bankrupt corporation, qualified as such trustee, and ever since has been and now is such trustee; that all proceedings in relation to the petition and adjudication in bankruptcy and the election, appointment, and qualification of plaintiff as trustee were in accordance with the provision of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," and acts amendatory thereof [Act July 1, 1898, ch. 541, 30 U. S. Stats. at Large, 544, U. S. Comp. Stats. 1901, p. 3418; Act Feb. 5, 1903, ch. 487, 32 U. S. Stats. at Large, 797, U. S. Comp. Stats. Supp. 1907, p. 1024]; that ever since his election and appointment as trustee said plaintiff has been and now is a resident of the city of Milwaukee, Wisconsin, and that for many years prior to the 18th day of August, 1905, said C. W. Milbrath Company was engaged in the real estate and loan business, with its principal offices and place of business in the city of Milwaukee, Wisconsin; that on the 17th day of May, 1905, the said Milbrath Company was, and for some time prior thereto had been, indebted to the defendant upon an open and running account between said bankrupt and said defendant in the sum of $521.25; that on and between the 17th day of May, 1905, and the 18th day of August, 1905, said Milbrath Company was insolvent and unable to pay its debts; that on the 17th day of May, 1905, said Milbrath Company, being insolvent and being indebted to said

defendant, and said defendant having theretofore demanded the payment of such indebtedness, paid to said defendant on account of said indebtedness $221.25, and thereafter and on the 5th day of July, 1905, paid on account of such indebtedness the sum of $300; that such payments were made to the agents of defendant, who received such payments for and on behalf of said defendant; that at the time of each of said paymcnts said *Jacob Bauernfeind* and his said agents had good reason to believe that said Milbrath Company was insolvent and unable to pay its debts, that it was intended by each of said payments to give defendant a preference, and that the effect of said payments would be to enable said defendant to obtain a greater percentage of his debts than any other creditor of the same class with him; that on or before August 1, 1907, plaintiff made a demand upon said defendant that he pay to said plaintiff as such trustee the money so received by him, and that said defendant refused so to do.

And the court concluded thereon that the said payments and each of them made by the said C. W. Milbrath Company to said defendant are voidable under and by virtue of the provisions of said bankruptcy act, and that said plaintiff is entitled to judgment against said defendant for said sum of $521.25.

Judgment was entered for $521.25, with interest from August 1, 1907, together with costs and disbursements, from which this appeal was taken.

For the appellant there was a brief by *Kronshage, McGovern, Goff, Fritz & Hannan,* and oral argument by *Guy D. Goff.*

For the respondent there was a brief by *McElroy, Ferguson & Lamfrom,* and oral argument by *W. J. McElroy.*

KERWIN, J. The only question which we find necessary to consider upon this appeal is the one relating to the so-called trust relation between the defendant and the C. W. Milbrath

Company. The court below found such relation was that of debtor and creditor and that the money placed in the hands of the Milbrath Company by defendant was not placed there in trust. This question involves the sufficiency of the evidence to support the findings of the court below, set out in the statement of facts, to the effect that the Milbrath Company was indebted to the defendant upon an open and running account between the Milbrath Company, bankrupt, and the defendant in the sum of $521.25.

It appears from the evidence without substantial dispute that for a period of about twenty years before the bankruptcy of the C. W. Milbrath Company it had been loaning the money of the defendant; that on or about February 1, 1905, the defendant called upon Mr. Milbrath of said company and demanded his money; that Mr. Milbrath then stated that they were a little short, but would make it up in a short time, whereupon defendant stated that he could get the money upon the receipts for the money given by the company showing the relation in which it was held; that defendant did in fact transfer the receipts to one Anton Kern and received therefor an assignment of a $3,600 mortgage, the amount of the receipts being $3,000, the defendant paying Kern the balance, $600. Whether the transfer of the receipts to Kern was an absolute sale or transfer for collection we need not consider, since, if the money represented by the receipts was a trust fund and belonged to defendant at the time of the transfer, the payments made by the Milbrath Company could not be recovered either from defendant or Kern. It further appears from the evidence that when money was collected for defendant he was notified and it was paid over to him, or, as in some instances, he took a receipt for the money represented by the collection and permitted the company to reloan it for him.

The evidence clearly shows a trust relation between defendant and the C. W. Milbrath Company by which the company took, received, and held the money of defendant for the pur-

pose of loaning it, and there appears to be practically no evidence of the relation of debtor and creditor. The only evidence from which any inference could be drawn rebutting the trust relation is that tending to show that the company may have mixed the funds of defendant with its own. This alone is clearly insufficient to support the finding under consideration. Upon the evidence in the case the $521.25 paid by the bankrupt did not diminish its assets or enrich the defendant at the expense of the general creditors. Under the bankruptcy act the trustee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time of the vesting of the trustee's title. Loveland, Bankruptcy (3d ed.) § 173; *Van Ingen v. Feldt,* 86 Wis. 345, 56 N. W. 923; *In re Royea's Estate,* 143 Fed. 182; *Smith v. Au Gres,* 150 Fed. 257.

We think the clear preponderance of the evidence is against the finding to the effect that the relation of debtor and creditor existed between defendant and the C. W. Milbrath Company, but, on the contrary, the evidence establishes that the money paid, to wit, $521.25, was the money of the defendant or his assignee. It matters not which so far as this appeal is concerned. In the view we take of the case it becomes unnecessary to treat the other questions argued in the briefs. It follows that no case was made for the recovery of the payments alleged to be preferential.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

FORSTER, Appellant, vs. FLACK and wife, Respondents.

May 13—June 3, 1909.

Vendor and purchaser: Rescission by vendor: Pleading: Relevancy of allegations: Equity: Cancellation of instruments: Adequate remedy at law: Rights of action: Executed contracts: Damages.

1. In an action for rescission of an executed purchase of corporate stock under an agreement by which plaintiff had conveyed land to defendant in payment for said stock and defendant had agreed that certain dividends would be paid thereon and had further agreed that at any time, on plaintiff's request, he would give the latter stock in another corporation in place of that first mentioned, the complaint alleged that defendant by false representations had induced plaintiff to make a partial exchange of the stock, and alleged that no dividends had been paid as agreed. *Held*, that the allegations as to false representations inducing the exchange of stock were irrelevant to the relief sought.
2. Breach of a condition subsequent, of an express warranty, or of a covenant, in the absence of other grounds of equitable jurisdiction, will not support a complaint in equity for rescission of a contract, the remedy at law being adequate.
3. A fully executed agreement, whereby plaintiff conveyed land to defendant in consideration of certain corporate stock, cannot be rescinded in equity solely for breach of defendant's undertaking that the stock would pay agreed dividends.
4. In such case a complaint alleging breach of the agreement that the shares of stock transferred to plaintiff would pay certain dividends, without allegation as to the value of either the stock or land, states no legal cause of action, since failure to declare or pay dividends does not necessarily affect the intrinsic value of the shares.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint.

For the appellant there was a brief by *McGee & Jeger*, and oral argument by *L. Jeger*. They cited, among other cases, *Boothby v. Scales*, 27 Wis. 626; *Woodle v. Whitney*, 23 Wis. 55; *Warder v. Fisher*, 48 Wis. 338, 4 N. W. 470; *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 82 N. W. 154; *Fairfield v. Madison Mfg. Co.* 38 Wis. 346; *Neave v. Arntz*, 56 Wis. 174, 14

N. W. 41; *Hahn v. Doolittle,* 18 Wis. 196; *Osborn v. Nicholson,* 13 Wall. 654.

For the respondents there was a brief by *Blatchley & Gilbertson,* and oral argument by *A. H. Blatchley.* Among other references they cited *Merrill v. Nightingale,* 39 Wis. 247; 30 Am. & Eng. Ency. of Law (2d ed.) 190; *Smith v. Hughes,* 50 Wis. 620, 7 N. W. 653; *McLennan v. Prentice,* 85 Wis. 427, 55 N. W. 764; *Clementson v. Streeter,* 59 Wis. 429, 18 N. W. 340; *Falkner v. Woodard,* 104 Wis. 608, 80 N. W. 940; *Patton v. Taylor,* 7 How. 132; *Kelley v. Kelley,* 80 Wis. 486, 50 N. W. 334; *Deery v. McClintock,* 31 Wis. 195.

TIMLIN, J. The complaint avers the purchase by the plaintiff from the defendant named of 52,000 shares of the capital stock of a certain corporation in consideration of the sale and conveyance by plaintiff to defendant of a parcel or tract of real estate. Accompanying the sale of the corporate stock it is averred that there were two agreements: (1) That a dividend would be declared on this stock and paid within ninety days, and thereafter weekly dividends would be declared and paid thereon for at least four weeks; (2) that the defendant would at any time at the request of the plaintiff exchange the whole or any part of said shares of stock for shares of the capital stock of another mining corporation at the rate and in the proportion of 3,000 shares of the latter for 20,000 shares of the former. This defendant within a short time thereafter made many false and fraudulent representations to the plaintiff, and, relying and acting thereon, the plaintiff exercised his option to demand the exchange of stock agreed upon and did exchange 20,000 shares of the 52,000 shares first received for 3,000 shares of the other stock. This defendant mortgaged the real estate received in exchange for $5,000 to some person not named. No dividend was declared or paid on the first-mentioned stock within ninety days

from the date of purchase, nor were any weekly dividends declared or paid on said stock at any time thereafter, whereupon the plaintiff tendered to this defendant 32,000 shares of the 52,000 shares first purchased and 3,000 shares of the exchanged stock and demanded of this defendant that he reconvey to the plaintiff the real property mentioned free and clear of all incumbrances, or that he reconvey the said property and pay the plaintiff $5,000, being the amount of the mortgage placed on the property by the defendant. Plaintiff also demanded of this defendant's wife that she release her dower, but both defendants refused to comply. Therefore the plaintiff asks that the defendants be required to reconvey to him the real estate in the complaint described and that he have and recover $5,000 to compensate him for the mortgage placed on the property by defendant, and that he have costs and general relief.

The false and fraudulent representations by which the plaintiff was induced to exchange the shares of stock are wholly irrelevant to the relief sought to be obtained. The fact that the exchange was made of one kind of mining company's stock for another in pursuance of an option so to do is quite irrelevant to the relief sought. The only ground for the rescission prayed is therefore that no dividend was declared or paid on the stock first received. It does not appear whether the transaction, aside from the conveyance of the land, was or was not evidenced by writing. The agreement concerning the payment of a dividend is pleaded in this form:

"That said stock was sold by the defendant *J. W. Flack* and purchased by the plaintiff upon the condition subsequent and the expressed warranty that a dividend would be declared on said stock and paid within ninety days from said 20th day of February, 1907, and that weekly dividends would be declared and paid upon said stock for at least four weeks thereafter."

There is nothing else in the pleading to inform us of the terms of the agreement in this particular. The pleader des-

ignates this agreement by the inconsistent names of "condition subsequent" and "express warranty." It is manifestly neither, but is a covenant or promise. It is elementary law that breach of a condition subsequent, breach of an express warranty, or breach of a covenant, in the absence of other grounds of equitable jurisdiction, will not avail to support a complaint in equity for rescission of a contract. *Davison v. Davison,* 71 N. H. 180, 51 Atl. 905; *Raley v. Umatilla Co.* 15 Oreg. 172, 13 Pac. 890; *Love v. Teter,* 24 W. Va. 741. In the absence of fraud, mistake, trust, cloud on title, multiplicity of suits, necessity for cancellation, or some other independent ground of equitable jurisdiction, a court of equity will not interfere to rescind a contract on the sole ground that the defendant has failed to perform his part of the contract or has broken its warranties or conditions. In such case the remedy at law is adequate. *Douglas Co. v. Walbridge,* 38 Wis. 179; *Farrar v. Bridges,* 3 Humph. 566; *Piedmont L. I. Co. v. Piedmont F. & M. Co.* 96 Ala. 389, 11 South. 332; *Birmingham W. & E. Co. v. Elyton L. Co.* 93 Ala. 549, 9 South. 235; *Harrington v. Rutherford,* 38 Fla. 321, 21 South. 283; *Moore v. Cross,* 87 Tex. 557, 29 S. W. 1051.

The complaint, purporting to state a cause of action for equitable rescission, is fatally defective in that regard. *Linn v. Gunn,* 56 Mich. 447, 23 N. W. 84. In addition to this the contract was fully executed. *McLennan v. Prentice,* 85 Wis. 427, 55 N. W. 764. The complaint affirmatively shows that the plaintiff has an adequate remedy at law to recover his damages, if any there be. No legal cause of action can be spelled out of the complaint, because there is nothing to show the value of the stock received or the value of the land given in exchange. The failure to declare or pay dividends does not necessarily affect the intrinsic value of the shares. The demurrer was properly sustained.

By the Court.—The order sustaining the demurrer is affirmed.

GLENESKY, Respondent, vs. KIMBERLY & CLARK COMPANY, Appellant.

May 13—June 8, 1909.

Master and servant: Duties of master: Safe place to work: Negligence: Personal injuries: Unguarded machinery: Duty to instruct servant

1. The rule requiring the master to furnish his servant with a reasonably safe working place calls only for a working place free from all dangers which a person in the circumstances of the master, in the exercise of ordinary care, ought to know of, and which, under the circumstances, the servant, in the exercise of ordinary care, is not legally chargeable with knowledge of.
2. A master is not required to instruct a servant as to the existence of danger, unless it is reasonably to be apprehended that the circumstances requisite to set that danger in motion may probably occur.
3. Failure of the master to instruct a servant as to matters which the servant must have known in consequence of his employment does not constitute actionable negligence.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an action brought to recover damages for personal injury. The plaintiff when injured was employed in removing pulp from the wooden roll forming a part of one of the wet machines used in the defendant's pulp mill at Niagara. Such wet machine consists in part of two rolls, one being made of iron and the other of wood. The iron roll is set in a frame and is about fifteen inches in diameter. The bottom of the roll is about twenty inches above the floor of the machine room and parallel therewith. The wooden roll rests directly on the iron roll and is twenty-one and one-fourth inches in diameter. When the machine is in operation the bottom or iron roll revolves toward the operator, carrying an endless felt, which passes through a vat or receptacle containing water and ground wood pulp. A certain amount of pulp is re-

moved from the vat by adhering to the felt. As the felt containing the pulp comes in contact with the wooden roll the pulp is transferred from the felt to such roll. The wooden roll is turned by means of contact with the felt revolving on the lower roll. By reason of the weight of the wooden roll a portion of the water is squeezed out of the pulp as it becomes attached thereto, but the pulp is sixty per cent. water after being wound on the roll and has very little adhesive power or cohesive strength. The wooden roll, being revolved by the iron roll, turns in the opposite direction, or away from the operator of the machine, and moves slowly, making fifteen or twenty revolutions a minute. After about forty revolutions a layer of pulp is formed around the wooden roll of convenient thickness, which is removed by inserting a sharp pointed wooden stick in a groove near one end of the roll and pushing it along the roll horizontally until the cylindrical sheet of pulp is severed. A part of the time the severed end will drop down of its own weight on a table in front of the machine, and a portion of the time it is necessary to take hold of it with the fingers in order to remove it. Whether it will fall of its own weight, or some degree of force must be used to remove it, depends to some extent upon the position of the rent with reference to the top of the roll. If near the top, the sheet is not apt to drop of its own weight, although a slight amount of force will suffice to loosen it from the roll. The roll itself is about eighty-four inches in length, and the width of a sheet of pulp formed thereon is about sixty-three inches. The operator stands near to the right end of the roll and about twelve or fourteen inches therefrom, and there is no table between him and the roll, but there is one immediately to his left. The plaintiff had been working for about four months, on and off, at removing pulp from the roll of one of the wet machines of the defendant company. His work of this character would be about the equivalent of two months' steady work. He was twenty years of age and uneducated. In

doing his work he stood upon a platform three feet square and nine inches from the floor. From the top of this platform to the top of the wooden roll was forty-seven inches. The plaintiff was injured by reason of his hand coming in contact with and being drawn in between the two rolls heretofore described. The plaintiff's hand necessarily passed over the top of the wooden roll and followed it around to the point of contact between the two rolls, such point of contact being on the side of the rolls opposite from where the plaintiff worked. The distance from the top of the wooden roll to the point of contact, measured along the surface of the roll, was about thirty-three inches. It seems to be conceded that the plaintiff, while standing upon the platform, could not reach around the roll so as to bring his fingers in contact with the lower roll, and that such contact could only occur when the body was raised from the platform.

The plaintiff testified that when he tore the pulp with his stick he took the stick in his left hand and took hold of the pulp with his right hand, and that the pulp did not come off, and that it caught his hand and drew it into the rollers on the opposite side from where he stood. He further testified that the pulp stuck to the roll. The witness was not conversant with the English language, and it is fair to assume that he intended to say that the friction produced by his hand coming in contact with the pulp drew his hand between the rolls. Manifestly the pulp did not and could not otherwise draw his hand, because there was nothing to prevent his letting go of the sheet of pulp if he was unable to detach it from the roll, and at best it is not claimed that such removal would require any considerable force or effort. A witness sworn for defendant saw the accident, and testified that plaintiff had placed some sheets of pulp upon the platform on which he was standing; that after making the rent in the sheet he grabbed for it to detach it and missed it, and then made another grab and

slipped and fell on the roll, and was carried over by it so that his hand got between the rolls.

The foregoing states in substance all the material testimony as to how the accident happened. It appeared from the testimony that operators occasionally dropped the sticks used in skinning the rolls and that such sticks were carried over and injured the felts. To prevent occurrences of this kind a board was placed in a position parallel with the upper roll, a space being left between the edge of the board and the roll of sufficient width so that the board would not interfere with the formation of a layer of pulp on the roll, but not wide enough to admit of the skinning stick passing between the roll and the board. This board was placed along the side of the roll opposite from where the operator worked, and a short distance beyond the apex of the roll. The evidence was undisputed that this board or guard was not put in place for the purpose of affording any protection to operators, and because of its proximity to the operator it is manifest that, if the fingers of the operator rested on the roll and followed it any considerable distance beyond the top, they were liable to be pinched between the roll and the board. It is likewise apparent that if this board had been in place it would have prevented the particular accident that befell the plaintiff. For some reason the board or guard in question had been removed about two days before the plaintiff was injured and had not been replaced. The jury found that the defendant was negligent in not maintaining a guard so as to prevent the plaintiff's hand being crushed between the rolls and also in failing to warn the plaintiff of the danger incident to his employment. The defendant moved for a nonsuit, and for a directed verdict, and to change the answers returned by the jury to certain questions in the special verdict and for judgment on the verdict as amended. These various motions were denied, and from a judgment rendered on the verdict defendant appeals to this court.

For the appellant there were briefs by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

For the respondent there was a brief by *Wigman, Martin & Martin*, and oral argument by *P. H. Martin*.

BARNES, J. A full statement of the undisputed facts in this case has been made, and the conclusion reached by the court obviates any discussion of the evidence. If the master was negligent in furnishing an unsafe machine it was because of failure to so guard it as to prevent the happening of the accident that occurred. No other defect in the appliance furnished is complained of. Notwithstanding the finding of the jury, we think the undisputed testimony shows that the machine was a reasonably safe one, and that the defendant was not negligent in failing to guard it in such a manner as to prevent the accident. The roll moved slowly, making but fifteen or twenty revolutions a minute. It revolved away from the operator. It was forty-seven inches from the top of the platform on which he stood to the top of the roll, and when at work he usually stood twelve or fourteen inches from the roll. The machine itself was fifty-six inches in height. The point of contact between the rolls was about thirty-five inches from the floor. There was not only this barrier fifty-six inches high in front of the operator, but, in order to get caught, his hand must necessarily have followed the roll around to the opposite side from where he was working, further than he could reach. Counsel on both sides concede that the plaintiff could not have reached around the upper roll to the point of contact with the lower one while standing on the platform. It required little force to remove the pulp from the roll, and the space above it was open and unobstructed. It is apparent that the accident could only have happened by the operator's body coming in contact with the roll, or by his holding onto the same with his hand so that he was lifted off his feet. If he fell against the roll, no explanation is offered

as to why he did not push himself off instead of clinging to it. It seems to us that a master must well-nigh have the gift of prescience to apprehend that there was any likelihood of an accident happening to an operator by being caught between these rolls, and that it would be holding him to an unusual and extraordinary degree of care to say that he was negligent in not having the foresight to conceive that such an accident might happen.

"The rule requiring the master to furnish his servant with a reasonably safe working place calls only for a working place free from all dangers which a person in the circumstances of the master, in the exercise of ordinary care, ought to know of, and which, under the circumstances, the servant, in the exercise of ordinary care, is not legally chargeable with knowledge of." *Hencke v. Ellis,* 110 Wis. 532, 539, 86 N. W. 171; *Mueller v. N. W. I. Co.* 125 Wis. 326, 330, 104 N. W. 67; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891.

Under any reasonable application of the foregoing rule the defendant was not negligent in failing to maintain a guard on the machinery in question, and it is evident that the work of the plaintiff would be attended with apparently greater danger when the guard was on than when it was off.

It is equally clear that the defendant was not guilty of negligence in failing to warn the plaintiff of the hazard that produced the injury.

"Granted that the danger existed, yet it does not follow there was a duty to instruct in regard to it, unless it was reasonably to be apprehended that the circumstances requisite to set that danger in motion might probably occur. . . ." *Dahlke v. Ill. S. Co.* 100 Wis. 431, 434, 76 N. W. 363; *Fleming v. Northern T. P. Mill,* 135 Wis. 157, 114 N. W. 841.

It seems clear to us that the accident was such that the defendant had no reasonable ground to apprehend that it might occur. Besides, the plaintiff operated this machine for a pe-

riod of two months, and in the exercise of ordinary care he should have known that if he fell against the roll and held it sufficiently tight to lift his body from the ground it would carry him over. He must also have known that if his fingers came in contact with the rolls they would be bruised. These were the only facts in reference to which the master could have instructed him.

The trial court should have directed a verdict in the defendant's favor. Failing to do so, the defendant's motion to change the answers returned by the jury to the second, third, fourth, and fifth questions in the special verdict should have been granted, and judgment entered in defendant's favor on the verdict as corrected.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment in favor of the defendant dismissing the plaintiff's complaint.

KERWIN, J., took no part.

BARBER ASPHALT PAVING COMPANY, Respondent, vs. CITY OF OSHKOSH, Appellant.

May 13—June 3, 1909.

Statutes: Construction: "May:" Municipal corporations: Streets: Improvements.

1. The ordinary and natural meaning of the word "may," when used in a statute, is permissive and discretionary, not mandatory, although it is construed as mandatory when such construction is necessary to give effect to the clear purpose and intent of the statute.
2. The word "may" in sec. 925—223, Stats. (1898), providing that whenever the city council shall order the paving or repaving of a street in which gas or water mains, or sewers, or either

of them, have previously been laid, they *may* require service pipes and house drains to be first laid to the curb line, and that no street shall be paved or repaved by order of the council unless the water and gas mains and service pipes and necessary sewers and their connections shall, *as required by the council*, be first laid and constructed,—is used in its ordinary and natural meaning and is not mandatory. *Gleason v. Waukesha Co.* 103 Wis. 225, in so far as it indicates that a city cannot pave without first requiring such connections to be made, overruled.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Fred Beglinger, city attorney, and *F. C. Stewart,* of counsel, for the appellant. They contended, *inter alia,* that the word "may" in a statute will be construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or the performance of a duty to which it refers, and such is its meaning in all cases *where the public interests and rights are concerned,* or a public duty is imposed upon the public officers, and the public or third persons have a claim *de jure* that the power shall be exercised. Sutherland, Stat. Constr. sec. 462 and p. 599; *Mason v. Fearson,* 9 How. 248, 259; *Supervisors v. U. S.* 4 Wall. 435; *Kennedy v. Sacramento,* 19 Fed. 580; *Buffalo P. R. Co. v. Comm'rs,* 10 How. Pr. 237; *Hall v. Wabash R. Co.* 80 Mo. App. 463; *Edwards v. Hall,* 30 Ark. 31; *State v. Saline County Court,* 48 Mo. 390; *Hagadorn v. Raux,* 72 N. Y. 583; *Vason v. Augusta,* 38 Ga. 542; *People ex rel. Fiske v. Brooklyn,* 22 Barb. 404; *Doane v. Omaha,* 58 Neb. 815; *Follmer v. Nuckolls Co.* 6 Neb. 204; *People ex rel. Putnam v. Buffalo Co.* 4 Neb. 150.

For the respondent there was a brief by *Bouck & Hilton,* attorneys, and *Frank M. Hoyt,* of counsel, and oral argument by *Mr. Hoyt.*

WINSLOW, C. J. The plaintiff, having paved certain streets in the city of *Oshkosh* under written contracts with the

city, sued to recover that part of the contract price which was to be paid by the city, and the defense made was that the contracts were void because the city had not required water and gas service pipes and sewer connections to be laid before the paving was done. Judgment having been rendered for the plaintiff the city appeals.

The city had adopted subch. XX of ch. 40*a*, Stats. (1898), relating to the construction of sewers, and the question is whether the word "may," as used in section 925—223 of that chapter, is permissive or mandatory. The section provides in effect that whenever the city council shall order the paving or repaving of a street in which gas or water mains, or sewers, or either of them, have previously been laid, "they *may* also by resolution" require service pipes and house drains to be first laid to the curb line at the expense of the abutting property, at such intervals as they shall direct. The section then provides for the giving of notice to property owners to lay such service pipes or connections, and for the laying of the same by the board of public works in case of default, and concludes with the proviso "that no street shall be paved or repaved by order of the council unless the water and gas mains and service pipes and necessary sewers and their connections shall, *as required by the council,* be first laid and constructed in that portion of such street so to be paved or repaved."

The ordinary and natural meaning of the word "may," when used in a statute, is permissive and discretionary, not mandatory, although it is construed as mandatory when such construction is necessary to give effect to the clear purpose and intent of the statute. The trial judge thought that it should be construed in its ordinary and natural meaning here, and we entirely agree with his view. To construe it as mandatory would mean that whenever a street containing water or gas mains or sewers was ordered to be repaved, the council must order new service pipes and connections to be laid, notwithstanding the fact that all necessary pipes and connec-

tions were already in place, operating perfectly, and good for many years of service. Such was the case in the present action, as admitted by the pleadings with reference to two of the streets paved. Other instances may easily be called to mind where, although water or gas mains or sewers already exist in a street, it would be utterly unnecessary and oppressive to require service pipes or connections to be made, because the adjoining property, by reason of its proximity to another street, is already fully and more economically served. No reason occurs to us which calls for a mandatory construction of the word. The final proviso of the section evidently means simply that, when the council has required pipes and connections to be laid, the paving shall not be done until the pipes and connections so ordered have been first laid.

The appellant confidently relies on *Gleason v. Waukesha Co.* 103 Wis. 225, 79 N. W. 249, as sustaining the contention that the council must make the order in every case. That action was brought by a taxpayer to set aside a special assessment for making gas and water connections because the council had not adopted the proper resolution nor given the proper notice requiring the connections to be made and because such assessments constituted a taking of private property for private use. It was determined by this court that, so far as the resolution and notice were concerned, the statute had been essentially complied with, so there was in fact no question before the court as to the effect of proceeding without requiring the connections to be first made. It is true that in discussing the question it was said, in passing, that the city was prohibited from paving the street *without first requiring connections to be made* with the mains and pipes run therefrom to the curb lines. As far as this indicates that the city cannot pave without first requiring connections to be made, it must be considered as overruled. The city having ordered the connections made in that case, the question as to the effect of a failure to make such order was not necessary to be considered.

The idea in mind was that, after the connections had been ordered in, the city had no right to pave until the connections had in fact been put in; and this was as far as the court intended to go.

By the Court.—Judgment affirmed.

LUCKOW, Respondent, vs. BOETTGER and another, imp., Appellants.

May 13—June 3, 1909.

Appeal from justices' courts: Judgment without new trial: Appeal to supreme court: Review: Findings of fact: Presumptions: New trial after reversal.

1. The circuit court when required to give judgment pursuant to sec. 3769, Stats. (1898), should act solely upon the evidence upon which the court below acted, not considering any ruled out by the latter as improper or any conjecture as to evidence which might have been given by answering questions not permitted, because thought to be objectionable.
2. On appeal to this court from the judgment of the circuit court given under sec. 3769, Stats. (1898), the rule obtains that the determination by such court as to facts should not be disturbed unless contrary to the clear preponderance of the evidence.
3. A determination by the circuit court of issues of fact by application of wrong rules of law is not supported on appeal by the presumption in favor of its correctness, requiring a clear preponderance of evidence to the contrary to warrant disturbing it.
4. Where, upon appeal to this court, findings of a trial court are condemned because made by application of wrong rules of law and the right of the matter does not clearly appear from the evidence, the case upon reversal will be remanded to the trial jurisdiction to find the facts, proceeding in the light of correct legal principles.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The action was tried in the municipal court of Manitowoc county. The practice as to appeals from such court to the circuit court is the same as in case of appeals from justices' courts. The judgment in the municipal court was in defendants' favor. They duly appealed to the circuit court without making the affidavit required by sec. 3768, Stats. (1898), requisite to obtain a trial *de novo*. The circuit court, nevertheless, considered evidence returned, which the municipal judge rejected as improper in deciding the case, and also inferred what witnesses would have testified to in answer to questions supposed to have been improperly ruled out, reaching the conclusion that the municipal judge's findings in some respects were wrong and reversed the judgment with costs as hereafter indicated.

Plaintiff's claim was this: October 27, 1901, plaintiff loaned defendants, as copartners, $500, to be paid with interest on demand, taking their promissory note therefor. December 27, 1901, there was paid thereon $100. The note was surrendered and it was agreed that the balance, $400, should be treated as a loan to defendants at five per cent. interest, and their note therefor was taken. December 27, 1903, the note was renewed by one made by defendant *H. J. Boettger*. No payment has been made upon that note, except interest prior to December, 1905. Plaintiff is entitled to judgment for the balance of the original loan with interest as specified in the last note subsequent to December 27, 1905.

The defendant *H. J. Boettger*, answering separately, and the others jointly, claimed this: Prior to the giving of the note of $400 the partnership was dissolved, *H. J. Boettger* assuming and agreeing to pay all the firm's indebtedness, of which plaintiff was fully advised, and plaintiff accepted the successor as his debtor in place of the firm, surrendering the $500 note, and taking the note of such successor for $400 and $20 cash as consideration therefor. Subsequently such proceedings were duly had in bankruptcy that such successor was

fully discharged from his indebtedness, including that on the note.

The trial court found as claimed by defendants, except: held, that the new note for $400 was not taken in payment of the firm's indebtedness upon the old note, under an agreement to accept the maker of the former as the sole debtor; that the new note was taken as a renewal of the old indebtedness and as security therefor; that no consideration passed at the time of the transaction of taking the new note for a substitution of the individual liability of the maker thereof for that of the firm; that on the trial the new note was duly surrendered into court to be delivered to the maker; that such maker was, as claimed, duly discharged of his indebtedness in bankruptcy; and that the judgment of the municipal court dismissing the cause as to him should be affirmed, but that the judgment as to the other defendants should be reversed and judgment be rendered against them for the unpaid indebtedness, being with interest $435.44 with costs.

Judgment was rendered accordingly, from which this appeal was taken.

For the appellants there was a brief by *Healy & Joyce,* attorneys, and *C. H. Sedgwick,* of counsel, and oral argument by *Mr. Sedgwick.*

For the respondent there was a brief by *F. W. Dicke,* attorney, and *Nash & Nash,* of counsel, and oral argument by *Mr. Dicke* and *Mr. E. G. Nash.*

MARSHALL, J. The appeal from the municipal court in question should have been disposed of in the circuit court as provided in sec. 3769, Stats. (1898), that is to say, there being no affidavit entitling appellant to a trial *de novo,* judgment should have been given "according to the weight of the evidence and justice of the case without regard to technical errors" not affecting "the merits and without regard to the findings of the" municipal judge.

Formerly the practice was merely to affirm or reverse the judgment of the trial court. That was changed by the revision of 1878 so as to permit of a reversal or affirmance, in whole or in part, either as to damages or costs, or both, but the findings of the trial court were still required to be given sufficient weight to preclude their disturbance unless unsupported by the evidence. That is, such findings were to be regarded on appeal as having substantially the force of findings in case of an appeal to this court from the circuit court upon the question of whether they are warranted by the evidence. That was changed by ch. 216, Laws of 1891, so as to require the evidence returned to the circuit court to be viewed, substantially the same as if taken originally in such court, the findings of the trial court to be regarded as having very little dignity in the matter (*Silvernail v. Rust,* 88 Wis. 458, 60 N. W. 787), yet not to be so wholly disregarded but that the advantages of the trial court over the reviewing court, by reason of opportunity to see and hear the witnesses, might be taken account of (*Smith v. Norton,* 114 Wis. 458, 90 N. W. 449). The court there said:

The language of the statute, "without regard to the finding of the justice," does not mean that "the evidence returned must be construed most strongly in favor of the losing party. The question presented is purely one of fact. The justice who saw and heard the witnesses found for the defendant. He undoubtedly did so because he thought such finding was in accordance with the weight of the evidence. The evidence returned seems to justify such finding. The county court affirmed that judgment. Notwithstanding the language of the statute, we must concur in such finding."

The two amendments to the original statute leave the practice the same as formerly, to the extent that the decision of the circuit court is required to be made upon the evidence returned by the trial court as having been considered there. The former cannot legitimately consider evidence ruled out by the latter even if it is embodied in the return, nor consider

the effect of answers which it may be conjectured witnesses would have given to questions ruled out as improper. To do so would be clearly extrajudicial because the statute, quite clearly, though not expressly, prohibits it.

The result of the foregoing is that the circuit court, in not taking into consideration at all the advantages which the municipal court had of seeing the witnesses and hearing them testify, and in not only considering evidence which the municipal judge ruled out but evidence not given at all; evidence it was supposed would, or might, have been given had questions ruled out as improper been permitted to be answered, committed errors of law, rendering the conclusions reached not supported in this court by the ordinary presumption of correctness. That presumption in presence of the conclusion having been reached by the application of wrong rules of law does not obtain in case of an appeal from a judgment of the circuit court on appeal from an inferior court without a new trial. The rule is the same in such circumstances as on appeal from a judgment of the circuit court in a case tried without a jury. *Donner v. Genz,* 129 Wis. 245, 107 N. W. 1039, 109 N. W. 71; *Brunkow v. Waters,* 131 Wis. 31, 110 N. W. 802. In any case, findings of a trial court on matters of fact made by application to the evidence of wrong rules of law which did, or probably may have, efficiently influenced the result, are not supported in the reviewing court by any presumption of their correctness, but they must be tested solely by the evidence. Unless it appears that there is a clear preponderance of such evidence in support of the judgment as it was proper for the trial court to have considered, it must be reversed and the cause remanded to the proper jurisdiction to make the proper findings and judgment, subject to review. *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363; *Hawkes v. Slight,* 110 Wis. 125, 85 N. W. 721; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246.

In *Kinn v. First Nat. Bank,* 118 Wis. 537, 548, 95 N. W. 969, it was said: "The trial court is the appropriate place for the determination of such questions."

And in *Priewe v. Fitzsimons & C. Co.* 117 Wis. 497, 511, 94 N. W. 317, 322:

"The evidence is certainly not sufficiently conclusive for respondents to enable us to come to a satisfactory conclusion . . . without doing the work here that rightfully should be done by a trial judge and generally is left, upon a reversal, for him to do, where there is considerable doubt as to the truth of the matter."

In *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 443, 89 N. W. 538, 92 N. W. 266, the case turned below on a conclusion of fact reached under a wrong conception of the law, necessitating a reversal, and it was uncertain which of two reasonable inferences was right in the light of right rules of law, and it was said:

"In that situation this court does not direct the judgment to be rendered if the unsolved issues of fact might go either way and it is doubtful which is proper, so that in attempting to decide them originally here injustice might be done."

It may be that it would be better practice in such a case as this to determine here the right of the matter from the evidence and end the litigation. True, it seems like imposing an unnecessary burden upon a respondent having just such a judgment as he is entitled to, to mulct him with costs because of an error for which he is not to blame and compel him again to seek redress in the trial court with the danger of a second appeal to this court before the controversy can be finally terminated. It may be that, especially in a case of this sort, where the trial court cannot any more than this court have the benefit of seeing the witnesses and hearing them testify,—where the opportunity for determining the real right of the matter is the same here as in the court below with the advantages in favor of this jurisdiction of several minds to deal

with the subject instead of one,—the cause should be finally terminated here in such a situation as we have before us, even if the rights of the parties upon the evidence be involved in considerable doubt. But the fact remains that this jurisdiction, in such matters, is for the exercise of purely appellate power, not that of rendering judgments as in the exercise of original jurisdiction, and the practice has been quite rigidly in harmony therewith. So much so, the court is of the opinion that it is not best, at this time, to depart from it even if that might legitimately be done.

It is the opinion here that, had the trial court not committed the errors of law referred to, a different conclusion might have been reached as to whether the new note was taken in payment of the old one; that, upon the evidence, the decision might go either one way or the other; and that which is the proper way is involved in serious doubt. Therefore, the judgment must be reversed.

We will not review the evidence or make any intimation as to the weight which should be given to any portion of it. That course seems best in order to leave the trial jurisdiction opportunity to discharge its duty untrammeled by any suggestion which might interfere with its judgment within its peculiar field.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

KUNZ and another, Appellants, vs. BOLL and others, Respondents.

SAME, Respondents, vs. PITZ and others, imp., Appellants.

May 13—June 3, 1909.

Principal and surety: Building contracts: Discharge of surety by advance payments.

Where the date of the actual completion of a building was September 20, and, as early as June 9, payments had been made to the contractor aggregating upwards of $2,000 in excess of the amounts stipulated to be paid prior to the final completion of the building, the amount of the advanced payments and the length of time in which they antedated the time when they should have been paid are such material variances from the contract as absolutely discharge the contractor's sureties. TIMLIN and KERWIN, JJ., dissent.

APPEALS from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed on plaintiffs' appeal; reversed on that of defendants.*

The plaintiffs had a contract with the nominal defendant, *Boll,* for the construction by the latter of a certain building and payment by the plaintiffs for the completed building of $18,360, "all payments to be on certificates of said architect as the work progresses, to wit: $4,000 on completion of foundation; $3,000 on completion of first story; $3,000 on completion of second story; $3,000 on completion of third story; $3,000 on completion of building; and balance sixty days thereafter, reserving fifteen per cent. of each estimate until final certificate is issued." The defendants other than *Boll* were a copartnership engaged in business as a bonding company, and in that capacity, for a compensation of $50 paid by *Boll,* gave a bond in the penal sum of $5,000 to the plaintiffs conditioned that *Boll* "shall well and truly furnish all the material and labor to be used and employed in the erection of a certain brewery building" according to the aforesaid contract. *Boll* completed the building September 20, 1905,

prior to which time there had been paid him a total of $15,100, in various sums, much of it before any certificates were given by the architect, but whether, as to some early payments, before the work had progressed to the prescribed stage, does not appear. On that day the contractor and the plaintiffs, together with the architect, had an accounting, ascertained that extra work had been done to the amount of $979.27, and there was then issued a certificate for the balance of $4,239.27. Lienable claims for labor and materials existed, which plaintiffs were obliged to pay, to an amount in excess of this balance. This action was brought to recover an alleged excess of such claims of about $2,700. The court made certain deductions of about $2,000 and rendered judgment against the sureties for $768 and interest and costs. From the whole of this judgment the defendant sureties appeal, and from the disallowance of the $2,010.58 the plaintiffs appeal.

For the plaintiffs there were briefs by *Nash & Nash,* and oral argument by *L. J. Nash.*

For the defendants there were briefs by *Hougen & Brady,* and oral argument by *A. L. Hougen.*

DODGE, J. Among the defenses interposed was that the owner and the principal contractor had modified the contract to the prejudice and consequent discharge of the sureties by paying large amounts of money thereon before the same was due according to its terms. This was supported by a showing that in the earlier stages of the work large amounts had been paid without any formal certificate of the architect, but the evidence is not so clear that they were paid before the money was earned according to the provisions of the contract, and there might well be doubt whether they were effective to release the sureties under the rule on the subject declared in *Madison v. Am. S. E. Co.* 118 Wis. 480, 95 N. W. 1097. It was made to appear conclusively, however, and indeed declared by the findings, that the building was not completed un-

til September 20th, and that as early as June 9th there had been paid to the contractor the sum of $15,100, while by the express terms of the contract only $13,000 was to be paid to him prior to the final completion of the contract. The efficacy of substantial advance payments upon contracts to discharge sureties is too well settled by the authorities in this state to warrant discussion. The prejudicial effect thereof to the surety has been found both in the removal of the incentive to the contractor to diligently press his work and from the diminution of the fund which the contract contemplates to remain in the owner's hands and which may serve as a means of protecting the sureties from liability. *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737; *Cowdery v. Hahn,* 105 Wis. 455, 81 N. W. 882; *Lowe v. Reddan,* 123 Wis. 90, 93, 100 N. W. 1038. In the present case it cannot be doubted that both the amount of the advanced payments and length of time in which they antedated the time when they should have been paid were material. In that respect they bear no resemblance whatever to the mere trifling variance from the contract presented in *Stephens v. Elver, supra.* For this reason we must hold that before the completion of the contract the sureties had been absolutely discharged from their liability, and no judgment can be had against them, which conclusion renders it unnecessary for us to consider the various other contentions.

By the Court.—Judgment reversed on defendants' appeal, and cause remanded with directions to dismiss the complaint; plaintiffs to take nothing on their appeal.

TIMLIN, J. (*dissenting*). I think the judgment of the circuit court should be affirmed on both appeals. The contract provided:

"All payments to be on certificates of said architect as the work progresses, to wit: $4,000 on completion of foundation; $3,000 on completion of first story; $3,000 on completion of second story; $3,000 on completion of third story; $3,000 on

completion of building; and balance sixty days thereafter, reserving fifteen per cent. of each estimate until final certificate is issued. The final payment shall be made within sixty days after the said above work is completely finished."

The total amount earned under the contract, with authorized extras, was $19,339.27. There is an apparent distinction between certificates issued as the work progresses and the final certificate. Neither of the five items above provided for includes the final certificate. Fifteen per cent. of each of the five items above is to be reserved until the final certificate is issued. The word "completion" should be given the same meaning in each of the five items. It is common learning that words following a *videlicet* point out or specify but do not restrain the generality of the preceding words. They particularize and point out. *Brown v. Berry,* 47 Ill. 175; 8 Words & Phrases. The fair inference is that the itemization points out a rate of preliminary estimates proportioned to the progress made, so that up to the time of completion of the building not more than the sum of such items, viz., $16,000, shall be paid on preliminary estimates. I think this is a fair and reasonable construction, bearing in mind the subject matter of the contract, how building operations are usually carried on, and having reference to the language of the contract. This amount was not exceeded by preliminary certificates up to the time of completion; hence the sureties were not on this ground discharged. But the sureties were entitled to have applied on claims in favor of third persons and against the contractor for labor and materials furnished the whole amount due from plaintiffs to contractors after completion and on deferred payments, which was $4,239.27.

After the liability of the sureties became fixed, plaintiffs applied part of this on moneys due them from the contractor, and they were therefore properly charged and the sureties credited with the sums so applied. Another part of this $4,239.27 was applied properly to the discharge of claims for

materials used in the building. The whole liability of the sureties was $5,000, which, minus $4,239.27, is $760.73, practically the amount for which judgment was rendered against the sureties, arrived at by a more roundabout process.

KERWIN, J. I concur in the foregoing dissent of Mr. Justice TIMLIN.

BADGER STATE LUMBER COMPANY, Respondent, vs. G. W. JONES LUMBER COMPANY, Appellant.

May 14—June 3, 1909.

Executory contracts: Stopping performance: Remedies: Damages for breach: Rights of parties, when determined: Entire contracts: Grounds of rescission: Pleading: Waiver: Delivery f. o. b. cars: When title passes.

1. Where specific performance of an executory contract cannot be enforced, either party may by explicit order stop performance by the other, subjecting himself thereby only to a liability to the other party for compensatory damages for such breach.
2. A contract for the sale of lumber to be manufactured, graded, tallied, hauled, and delivered on board cars at such times as cars are furnished by the purchaser, title to remain in the seller until the lumber is shipped and paid for, is executory so far as it relates to lumber not delivered at the time of a renunciation of the contract by the purchaser.
3. The rights of the parties under such a contract must be determined as of the date the purchaser renounces his contract and refuses to carry it out.
4. A contract requiring a commodity to be shipped in carload lots as cars are furnished by the purchaser, each car shipped before a designated date to be paid for in cash fifteen days from date of shipment, is apportionable and not entire.
5. Under such a contract the purchaser may receive part of the commodity and may breach the contract as to the portion not delivered without subjecting himself to liability for the purchase price thereof, provided the contract has not been performed by the seller as to the undelivered portion.

6. Ordinarily, facts which will warrant a rescission must have existed at the time the contract was made.
7. In an action to recover the contract price of lumber the defendant, having by answer denied plaintiff's right to recover on such cause of action, may, by counterclaim, plead that if it should be held liable to take and pay for any portion of the lumber it should be allowed damages by way of recoupment and setoff because of poor manufacture, without thereby waiving any rights it might have under an attempted rescission.
8. A contract obligating the seller to deliver a commodity f. o. b. cars is not a sale *in præsenti*, either when made or when the commodity is manufactured, since the title does not pass to the purchaser until the commodity is delivered by loading it on the cars.

APPEAL from a judgment of the circuit court for Pepin county: E. W. HELMS, Circuit Judge. *Reversed.*

On April 10, 1907, the plaintiff and defendant entered into a contract by the terms of which the plaintiff agreed to sell and the defendant agreed to buy all of plaintiff's stock of soft elm lumber. The contract recited that a considerable portion of the lumber was then sawed and in pile in the city of Durand, and that the remainder of the stock was to be sawed from logs at the Plummer mill in Durand, and at John Moy's mill in the town of Canton, Buffalo county, Wisconsin, and at Julliot's mill in the town of Waterville, Pepin county, Wisconsin, and at Gates's mill in the town of Frankfort, Pepin county, Wisconsin, and that so much of the logs as were unsawed were to be sawed as soon as possible under the supervision of the plaintiff. The plaintiff agreed to manufacture the portion of the logs not yet sawed into such thicknesses as the defendant might direct, and to cause the sawing to be done in a good and workmanlike manner; also to load the lumber sold (estimated at 550,000 feet more or less) into cars at Durand, Wisconsin, at such time as cars were provided by the defendant, but at the expense of the plaintiff. The plaintiff agreed to ship the lumber as soon as same was in shipping condition. The National Hardwood Lumber Association rules were to govern the inspection and scale, and

the inspection and scale were required to be made at the mill and were to be final. It was further provided that both of the parties should have their inspectors present when the lumber was being loaded, if they so elected, but, in the event of the failure of the defendant to furnish an inspector, the inspection made by the plaintiff should be final. In case any dispute as to scale or grade arose between the inspectors for the parties to the contract, which could not be settled by them, it was agreed that such dispute should be adjusted by an inspector of the National Hardwood Lumber Association. It was further agreed that the lumber should be well sawed, of proper thickness, edged and trimmed, and the logs so sawed as to produce as much of the upper grades of lumber as possible. The defendant agreed to ship all of said lumber on or before January 1, 1908. If any stock remained in the yard after that time, it was agreed that it should be jointly estimated by the representatives of the parties and be paid for according to such estimate. For all water elm, red elm, and gray elm the defendant agreed to pay the plaintiff, f. o. b. Durand, for No. 3 common and better, $20 per thousand feet, upon the following terms of payment: "Cash fifteen days from date of shipment, less two per cent. Sixty days from date of shipment, net." It was further agreed between the parties that title to the lumber should remain in the plaintiff until same was shipped out or paid for according to the estimate of January 1, 1908.

On November 27, 1907, plaintiff shipped to defendant, at its request, one carload of lumber. This car was invoiced at the contract price, and contained upper grades of lumber, and was paid for at the contract price. On November 29, 1907, the defendant wrote plaintiff as follows:

"It will be impossible for us to take the soft elm we bargained with you for, as the stock has not been sawed at all in accordance with our instructions. Our Mr. B. G. Harper, whom we sent there to take up a trial car of the stock, ex-

plained the matter fully to your Mr. Pierce, so you know what our grounds for complaint are against the lumber. We regret to advise you of this, but if you will look up the correspondence we have had with you in reference to sawing this stock, you will find that we gave you explicit and positive instructions regarding it, and these instructions have not been observed. Under these circumstances we feel justified in turning the stock down."

On the day following the plaintiff acknowledged receipt of this letter, in which it denied that the lumber was not properly manufactured, and stated that if the lumber was not shipped out by the defendant in accordance with the terms of the contract it would cause the lumber to be estimated, and commence action to recover the contract price of the same. On January 14, 1908, the plaintiff again wrote the defendant, calling its attention to the provision in the contract providing for an estimate of the lumber by joint representatives of the parties, and notifying the defendant that it was ready to proceed with such estimate, and further stating that if the defendant did not appear on or before January 28, 1908, it would on that date proceed to take the estimate without the co-operation of the defendant, and bring suit to recover the contract price. The defendant did not elect to take any part in making the estimate, and the plaintiff caused an estimate to be made in accordance with the statement contained in its letter of January 14th. On February 29, 1908, the plaintiff forwarded to the defendant a bill for the contract price of the lumber in accordance with the estimate made by it. The amount of such bill was $11,078.16. The defendant refused to pay, and this action was brought to recover the contract price of the lumber and resulted in a verdict and judgment in favor of the plaintiff for such contract price, from which judgment this appeal is taken.

For the appellant there was a brief by *Nash & Nash,* attorneys, and *C. A. Ingram,* of counsel, and oral argument by *L. J. Nash.* They contended, *inter alia,* that contracts like

the one in suit providing for the sale and delivery of a large quantity of lumber or other commodities in carload lots, with separate payments for the separate shipments, are manifestly severable; each delivery separates and executes the contract *pro tanto,* leaving what is still undelivered subject to any lawful objections, even though the lots already delivered and received were subject to the same objections. Such a partial delivery is not an acceptance of any part of the whole quantity not yet delivered. *Ketchum v. Wells,* 19 Wis. 25; *McDonald v. Gardner,* 56 Wis. 35; *Hoffman v. King,* 58 Wis. 314; *S. C.* 70 Wis. 372; *Gill v. Benjamin,* 64 Wis. 362; *McMillan v. Fox,* 90 Wis. 173; *Murphy v. Sagola L. Co.* 125 Wis. 363; *In re Kelly,* 51 Fed. 194; *Hubbard v. George,* 49 Ill. 275; *Cook v. Brandeis,* 3 Metc. (60 Ky.) 555; *Hollfield v. Black,* 20 Mo. App. 328; *American P. P. & B. Co. v. Oakes,* 64 Mo. App. 235; *Farmer v. Gray,* 16 Neb. 401, 20 N. W. 276; *Visscher v. Greenbank A. Co.* 11 Hun, 159; *Pacific Coast E. Co. v. Bravinder,* 14 Wash. 315, 44 Pac. 544; *Conway v. Fitzgerald,* 70 Vt. 103, 106, 39 Atl. 635; *Clark v. Wheeling S. Works,* 53 Fed. 494; *Creswell R. & C. Co. v. Martindale,* 63 Fed. 84, 86; *Bennett v. Shaughnessy,* 6 Utah, 273, 277, 22 Pac. 158; *Eastern F. Co. v. Corbin,* 182 Mass. 590. The defendant had the legal right to renounce and repudiate the contract, so long as it remained executory; absolutely and without recourse if for good cause, but just as absolutely without any cause; in the latter case, however, subject to defendant's liability to compensate the plaintiff for all resulting damages. *Ward v. American H. F. Co.* 119 Wis. 12, 25; *Fountain City D. Co. v. Peterson,* 126 Wis. 512; *Engeldinger v. Stevens,* 132 Wis. 423; *Collins v. Delaporte,* 115 Mass. 159, 162; *Oklahoma V. Co. v. Carter,* 116 Ga. 140, 94 Am. St. Rep. 112; *Gibbons v. Beate,* 51 Minn. 499, 22 L. R. A. 80. The measure of damages resulting from a wrongful renunciation of a contract of sale is never the contract price, but the difference between such contract price

and the market value of the chattels. The title to the lumber never passed to the defendant. The plaintiff still owns it. The contract provided that the title should not pass until the lumber was "shipped out or paid for according to the estimate of January 1, 1908." Eliminating the element of a wrongful renunciation or repudiation of an executory contract of sale, it is still the law that the seller cannot recover the purchase price until after the title has passed." Benj. Sales, sec. 311; 24 Am. & Eng. Ency. of Law (2d ed.) 1118–1120; *Smith v. Barron Co.* 44 Wis. 686; *Ganson v. Madigan,* 9 Wis. 146; *S. C.* 13 Wis. 67; *S. C.* 15 Wis. 144; *Pike v. Vaughn,* 39 Wis. 499; *Hoffman v. King,* 58 Wis. 314; *S. C.* 70 Wis. 372; *Ketchum v. Wells,* 19 Wis. 25; *Hill v. Chipman,* 59 Wis. 211; *Manufacturers' Bank v. Rugee,* 59 Wis. 221; *State ex rel. Vilas v. Wharton,* 117 Wis. 558; *Mason v. Decker,* 72 N. Y. 595; *Mitchell v. Le Clair,* 165 Mass. 308; *Brocklen v. Smeallie,* 140 N. Y. 70; *Jenkinson v. Monroe Bros. & Co.* 61 Mich. 454, 28 N. W. 663.

For the respondent there was a brief by *Wickham & Farr,* and oral argument by *James Wickham.* They contended, *inter alia,* that the authorities in this state and elsewhere sustain the proposition that the vendor in an executory contract of sale of personal property, on refusal of the vendee to accept the goods, may store the goods and recover the contract price. *Nisbet v. Gill,* 38 Wis. 657; *Boyington v. Sweeney,* 77 Wis. 55, 68; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648; *Hartman F. & C. Co. v. Krieger,* 137 Wis. 650, 119 N. W. 347; *Dustan v. McAndrew,* 44 N. Y. 72; *Hayden v. Demets,* 53 N. Y. 426; *Mason v. Decker,* 72 N. Y. 595, 28 Am. Rep. 190; *Bagley v. Findlay,* 82 Ill. 524; *McCormick H. M. Co. v. Markert,* 107 Iowa, 340, 78 N. W. 33; *Mitchell v. Le Clair,* 165 Mass. 308; *Van Brocklen v. Smeallie,* 140 N. Y. 70, 35 N. E. 415, 416; *Ganson v. Madigan,* 15 Wis. 144. The rescission, if at all, must be total. Any act by the purchaser in recognition of the contract precludes his right to rescind. *Churchill v. Price,* 44

Wis. 540; *Cream City G. Co. v. Friedlander,* 84 Wis. 53, 58, 59; *Kingman & Co. v. Watson,* 97 Wis. 596, 612; *Zipp Mfg. Co. v. Pastorino,* 120 Wis. 176; *James Music Co. v. Bridge,* 134 Wis. 510. A complaint or counterclaim for damages for breach of a contract is an affirmance of the contract, inconsistent with a claim that the contract has been rescinded, and is a waiver of any right to a rescission. *Main v. Procknow,* 131 Wis. 279; *Pfeiffer v. Marshall,* 136 Wis. 51, 116 N. W. 871; *Maxon v. Gates,* 136 Wis. 270, 116 N. W. 758. Where the buyer accepts property and fails to object in a reasonable time that it does not comply with the contract, he waives his right to afterwards object that the property does not comply with the terms of the contract, and waives his right to recover damages on account of any alleged defects. *Northern S. Co. v. Wangard,* 117 Wis. 624, 629; *H. McCormick L. Co. v. Winans,* 126 Wis. 649, 654; *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 128; *Forster, Waterbury Co. v. F. MacKinnon Mfg. Co.* 130 Wis. 281.

Barnes, J. The rule is well settled that in executory contracts, where specific performance cannot be enforced, either party has the power to stop the performance on the other side by an explicit order to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. In such cases it is held that an action cannot be maintained to recover the contract price, but may be maintained to recover damages for the breach of the contract. *Ward v. Am. H. F. Co.* 119 Wis. 12, 25, 96 N. W. 388; *Fountain City D. Co. v. Peterson,* 126 Wis. 512, 106 N. W. 17; *Merrick v. N. W. Nat. L. Ins. Co.* 124 Wis. 221, 226, 102 N. W. 593; *Tufts v. Weinfeld,* 88 Wis. 647, 60 N. W. 992; *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 494, 103 N. W. 236, 104 N. W. 920; *Engeldinger v. Stevens,* 132 Wis. 423, 424, 112 N. W. 507.

The decisions of this court upon the question under discus-

sion are in harmony with the great weight of authority elsewhere. Mr. Page states the rule applicable where one party to a contract, who is not himself in default, has covenants still to be performed when the breach is committed by the other party, as follows:

"The adversary party cannot ignore the breach, perform the covenants of the contract on his part to be performed, and recover the entire contract price as if no breach had occurred. This state of facts often exists in breach by renunciation." 3 Page, Contracts, § 1435. See cases cited in notes 2 and 3, p. 2219.

If the contract was still executory the defendant might breach it, and would thereby subject itself to the payment of such damages as would fairly compensate the plaintiff for the breach, and ordinarily such damages would be the difference between the contract price of the lumber and its value at the time of the breach. *Ganson v. Madigan,* 13 Wis. 67, 72; *S. C.* 15 Wis. 144, 150; *Chapman v. Ingram,* 30 Wis. 290.

The general rule that a breach of an executory contract gives a right of action for damages for the breach and not for recovery of the purchase price is not modified by the case of *Boyington v. Sweeney,* 77 Wis. 55, 45 N. W. 938. It is there held that where the vendor tenders a delivery in accordance with the terms of the contract, and an actual delivery is prevented by the refusal of the vendee to accept and receive the article at the time and place agreed upon, the vendor may sue for and recover the purchase price. In this case the plaintiff failed to furnish cars within a reasonable time, and before they were furnished a portion of the logs sold were burned, and it was held that the offer to deliver was tantamount to an actual delivery, and that the vendor had in fact performed his part of the contract. The case of *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368, holds that where a vendor, in an executory contract for the sale of goods to be paid for on delivery, discovers that the

vendee has become insolvent, he may store the property for the buyer and sue for and recover the purchase price. No other case in this court is called to our attention that has any tendency to mitigate the rigor with which the general rule referred to has been enforced.

It is a conceded fact in the case that the defendant wrote plaintiff on November 29, 1907, stating explicitly that it would be impossible for it to take the stock bargained for. Certain reasons were stated in the letter for the decision arrived at, which were found by the jury to be groundless. The letter was received in due course of mail and was replied to by the plaintiff upon the day following its date. The important questions in the case therefore are: (1) Was the contract executory when defendant's letter was received? (2) If it was, did the defendant by its subsequent conduct waive the renunciation of the contract contained in its letter? Whatever difficulties the case may present do not arise out of any uncertainty as to what the law is on the points involved. A correct application of the facts to the established rules of law is all that is necessary in order to determine the rights of the parties.

When does a contract, executory when made, become executed so that the vendor may sue and recover the purchase price of the article contracted for? In the early case of *Ganson v. Madigan,* 13 Wis. 67, 72, the court held:

"Where the vendor has actually taken all the steps necessary to vest the title to the goods sold in the vendee, he may sue for goods sold and delivered, and the rule of damages would be the contract price; but where he is ready and willing to perform, and offers to do so, but the vendee refuses, even though the title is not vested in the vendee, the vendor still has his action on the contract for damages; but the rule of damages in such case would be the actual injury sustained, which is ordinarily the difference between the value of the property at the time of the refusal and the price agreed on."

The contract in this case was for the sale of a reaper, and the vendee was informed that he could have his pick of a large number of reapers shipped to the agent of the vendor in knocked-down form. The vendee refused to make any selection, and the court held that because of the failure of the vendor to set up the reaper and make an offer or tender of it as an entirety he could not recover the purchase price, but only damages for the breach of the contract. The decision was re-examined at some length and re-affirmed on a second appeal. 15 Wis. 144, 150. The rule adopted in this case has not been departed from in any substantial particular, and it has in effect been followed in a number of cases since decided. *Tufts v. Weinfeld,* 88 Wis. 647, 60 N. W. 992; *Hoffman v. King,* 58 Wis. 314, 317, 17 N. W. 136; *Ward v. Am. H. F. Co.* 119 Wis. 12, 25, 96 N. W. 388; *McMillan v. Fox,* 90 Wis. 173, 62 N. W. 1052.

Under the authorities cited, and assuming that the title to the lumber contracted for did not pass to the vendee in the contract, we fail to see any logical ground for saying that such contract was not an executory one in so far as it related to lumber not delivered when the letter of renunciation was written. A portion of the lumber was sawed and in pile at Durand, Wisconsin. As to such lumber it was necessary to separate the No. 3 and better lumber from that below the grade of No. 3 and to ascertain the quantity of the same. Each party might furnish an inspector, and in case of disagreement it was provided that an inspector of the National Hardwood Lumber Association should act as umpire to settle the dispute. If the vendee failed to select an inspector, then the vendor might inspect, and such inspection should be final. The vendor was required to haul the lumber from the pile and deliver it on board cars at Durand. A portion of the lumber was at two or three different country mills several miles distant from Durand. The contract required such lumber to be inspected and tallied in the same manner as that located at

Durand, and also required the vendor to haul the same to Durand and deliver it on board cars. There was also a small quantity of lumber not sold under the contract mixed with that which was, and it necessarily would have to be separated before the contract was completed by the vendor. The evidence failed to show the expense which the plaintiff would necessarily incur in completing the contract, but it is apparent that it would be a very material item, and that the contract was not substantially performed by the vendor on November 29th. That it was ready, able, and willing to perform is not the equivalent of performance for the purposes of this case. *Ganson v. Madigan, supra.* The defendant might have ordered all of the lumber during the month of December, and the plaintiff would have been obliged to grade, tally, haul, and deliver the lumber on board cars. Prior to November 29th the defendant was not in default to the extent that it was not entitled to have the lumber delivered f. o. b. cars, and upon that date it renounced its contract and refused to carry it out. The rights of the parties must be determined as of that date, and we fail to see how we could logically hold that at that time the contract was even substantially performed by the plaintiff.

The contention that the contract was entire, and that the acceptance of and payment for one carload of the lumber was an acceptance of the entire stock and a waiver of any right to resist payment of the purchase price thereof, is not tenable. The contract required the lumber to be shipped in carload lots, and provided that each car shipped before January 1st should be paid for in "cash fifteen days from date of shipment, less two per cent. Sixty days from date of shipment, net." The contract was an apportionable one, and the defendant might receive part of the lumber thereunder and breach the contract as to the portion which was not delivered without subjecting itself to liability for the purchase price thereof, provided the contract had not been performed by the plaintiff as to the un-

delivered portion of the stock. *Ketchum v. Wells,* 19 Wis. 25, 33; *McDonald v. Gardner,* 56 Wis. 35, 41, 13 N. W. 689; *Clark v. Clifford,* 25 Wis. 597; *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513; *McMillan v. Fox,* 90 Wis. 173, 176, 62 N. W. 1052; *La Coursier v. Russell,* 82 Wis. 265, 52 N. W. 176; *Hildebrand v. Am. F. A. Co.* 109 Wis. 171, 85 N. W. 268; *Tilton v. J. L. Gates L. Co. post,* p. 197, 121 N. W. 331.

It is argued that the defendant waived any rights it might have under its attempted rescission of November 29th by counterclaiming in its answer for damages for alleged breaches of the contract on plaintiff's part. The cases of *Main v. Procknow,* 131 Wis. 279, 111 N. W. 508, and *Pfeiffer v. Marshall,* 136 Wis. 51, 116 N. W. 871, are cited to the point that a counterclaim for damages for breach of a contract is an affirmance of the contract and is inconsistent with and is a waiver of a plea of rescission. We do not understand that the defendant has ever asked that the contract be rescinded, or even claimed that any facts existed which would warrant a rescission. Contracts are usually rescinded because a party has been fraudulently induced to enter into the contract obligation. The facts that will ordinarily warrant a rescission must have existed at the time the contract was made. The position of the defendant here was that the plaintiff had breached its contract in material particulars and that for such reason defendant would not perform. The defendant by its pleading denied the right of the plaintiff to recover the contract price of the lumber. It then stated that, if it should be held liable to take and pay for any portion thereof, it should be allowed $5 per thousand damages by way of recoupment and setoff because of poor manufacture. We do not think this answer comes within the principle of the cases cited, or that there was any waiver on defendant's part of its right to insist that the only recovery that could be had against it was the amount of damages occasioned by the breach of its contract.

It is urged that the contract constituted a sale of the lumber *in præsenti,* either when made or when the lumber was manufactured, notwithstanding the reservation of title made by the vendor, until the lumber was paid for. The contract obligated the vendor to deliver the lumber f. o. b. cars. A number of such contracts have been before this court, and it has been held that the title under such a contract does not pass to the vendee until the article sold is delivered by loading it on cars. *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820; *Fromme v. O'Donnell,* 124 Wis. 529, 103 N. W. 3; *Murphy v. Sagola L. Co.* 125 Wis. 363, 103 N. W. 1113; *Engeldinger v. Stevens,* 132 Wis. 423, 112 N. W. 507; *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 94 N. W. 337; *State ex rel. Pittsburgh C. Co. v. Patterson,* 138 Wis. 475, 120 N. W. 227. The contrary rule adopted in *Boyington v. Sweeney,* 77 Wis. 55, 45 N. W. 38, has been overruled. *Vogt v. Schienebeck, supra.*

The conclusions reached render it unnecessary to consider various other matters discussed in the briefs and in the oral argument.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

RICHARDS, Appellant, vs. MANITOWOC AND NORTHERN TRACTION COMPANY, Respondent.

May 14—June 3, 1909.

Executory contracts: What constitutes a breach: Stopping performance: Damages: Appeal: Affirmance.

1. **The refusal of one party to perform his part of an executory contract unless the other party consents to a modification constitutes a total breach of the contract.**

2. If, while a contract to do work and furnish materials is still executory, the party for whom it is to be done orders the work stopped, the remedy of the other party is to recover damages for such breach. He cannot proceed with performance and recover the value of the completed job.
3. In the absence of a showing that appellant is entitled to recover more than the amount for which he had judgment and which respondent concedes, the judgment should be affirmed.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was brought to recover the sum of $606.12 for labor performed and materials furnished in August and September, 1902, at the special instance and request of defendant. The complaint alleges, in effect, that the plaintiff was doing business under the name of Richards Iron Works, and that the defendant was a corporation operating a street interurban railway in the city of Manitowoc; that during August and September, 1902, plaintiff performed the labor and furnished the materials above referred to, and that a statement of the account was furnished on September 11, 1902, and no payment has been made thereon. The defendant admits its corporate existence and business, and denies generally the other allegations of the complaint. The case was referred, and the referee made and filed his report, in which he found that plaintiff was entitled to recover $75 and costs. Plaintiff filed exceptions to the report and findings of the referee and moved the circuit court to modify the report and for judgment as modified in the sum demanded in the complaint. The circuit court denied the motion to modify, confirmed the report of the referee, and ordered judgment for the plaintiff in the sum of $75 and interest at six per cent. from November 9, 1907, to date of its order, together with costs and disbursements. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *A. L. Hougen* and *C. H. Sedgwick,* and oral argument by *Mr. Hougen.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.*

KERWIN, J. The referee found, among other things, that the defendant was operating a street railway line along the highways of the city of Manitowoc and across the Manitowoc river upon a bridge; that in July, 1902, the superintendent of defendant, duly authorized, ordered of plaintiff certain appliances for use on the bridge; that the plaintiff accepted the order and immediately began work under the contract; that about the second day after the appliances had been ordered the general superintendent and superior officer of defendant, with authority so to do, peremptorily ordered the work stopped if the job was to cost more than $75, but, notwithstanding, the plaintiff proceeded with the work and finished the job at a cost of $606.12; that defendant refused to pay any amount in excess of $75; that plaintiff applied to the common council of the city of Manitowoc and received permission to remove the appliances from the bridge, but never did remove them; that the appliances furnished were worth $606.12. And as conclusions thereon that the appliances were ordered by authority of defendant; that when ordered it was believed by the superintendent of defendant that they would cost not to exceed $75; that within two days after the order was given the order was canceled and the work ordered stopped unless the cost of the job was limited to $75; that the plaintiff elected to proceed with the job and elected and submitted to the condition and consented to do the job for $75; that the first contract was superseded by the second implied agreement; that by electing to proceed with the construction the plaintiff became bound by the limitation and cannot recover in excess of $75; and that plaintiff is entitled to recover the sum of $75.

The main contention of appellant is that, because a valid contract was made and no price fixed, he was entitled to com-

plete the job and recover what it was reasonably worth. It does not appear definitely how much had been done under the contract when the work was ordered stopped and the contract canceled. Only two days had elapsed from the time of the giving and acceptance of the order, and a large and substantial part, perhaps the principal part, of the contract was then unperformed and the contract executory. There is no doubt that the refusal of the defendant to perform on its part unless plaintiff would consent to a modification was a total breach of the contract. But notwithstanding the breach the plaintiff had no right to proceed and perform the contract, which was executory at the time of breach, and recover the value of the completed job. His remedy was to recover damages for the breach and proceed no further with performance of the contract on his part. *Ward v. Am. H. F. Co.* 119 Wis. 12, 96 N. W. 388; *Fountain City D. Co. v. Peterson,* 126 Wis. 512, 106 N. W. 17; *Engeldinger v. Stevens,* 132 Wis. 423, 112 N. W. 507.

The theory obviously of the appellant is that the plaintiff, after the contract was made, had a right to proceed and complete it, notwithstanding the order of defendant to proceed no further. This is not the law. While the contract remained executory the defendant had a right to stop the performance on the part of plaintiff by subjecting itself to such damages as would compensate plaintiff for being stopped in the performance of the contract. *Ward v. Am. H. F. Co., supra; Hamilton v. McPherson,* 28 N. Y. 72; *Johnson v. Meeker,* 96 N. Y. 93; *Hinckley v. Pittsburgh B. S. Co.* 121 U. S. 264, 7 Sup. Ct. 875; *Badger State L. Co. v. G. W. Jones L. Co., ante,* p. 73, 121 N. W. 933.

The plaintiff on the trial, however, did not claim damages on account of breach, but maintained his right to recover on the original contract for the value of the job completed, and the main question litigated appears to have been whether the original contract was modified so as to limit the cost of the

job to $75. The plaintiff offered no evidence of the damages occasioned by the breach. The court below as well as the referee seems to have awarded judgment for $75 on the theory that, when the defendant ordered the work stopped unless it could be done for $75, and plaintiff proceeded with and completed the job, plaintiff impliedly agreed to the modification. We need not decide this proposition. The plaintiff not having proved the amount of his damages occasioned by the breach, and it not appearing that he was entitled to recover more than $75, the amount which defendant concedes, we think the judgment was right and must be affirmed.

By the Court.—The judgment is affirmed.

STATE EX REL. HATTABAUGH, Appellant, vs. BOYNTON, Respondent.

May 14—June 3, 1909.

Extradition: Arrest on civil process.

One who has been brought into this state by extradition proceedings based on a criminal charge is not subject to arrest in contempt proceedings to enforce compliance with a prior civil judgment against him, until he has had an opportunity to return to the state from which he was extradited, even though he was, when he absconded, a resident of this state and had not since acquired a residence elsewhere, and the court in which said judgment was rendered had, before his departure, obtained jurisdiction both of the subject matter of the action and of his person.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The appeal is from an order discharging an attachment for contempt of court.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.* They cited, among other au-

thorities, *Matthews v. Puffer,* 10 Fed. 606; *Saveland v. Connors,* 121 Wis. 28, 98 N. W. 933; *Bonahan v. Nebraska,* 125 U. S. 692, 8 Sup. Ct. 1390; *Allen v. Georgia,* 166 U. S. 138, 17 Sup. Ct. 525; *Wartman v. Wartman,* Fed. Cas. No. 17,210.

For the respondent there was a brief by *J. S. Anderson,* attorney, and *A. L. Hougen,* of counsel, and oral argument by *Mr. Hougen.* They cited, besides other cases, *Anderson v. Rountree,* 1 Pin. 115; secs. 2965, 2966, Stats. (1898); *In re Blair,* 4 Wis. 522.

TIMLIN, J. Upon affidavit showing that in an equitable action against a trustee for an accounting judgment was on July 18, 1907, given and rendered against the defendant, *Prescott Boynton,* and in favor of the relator, and that the defendant, after the cause was tried and while it was pending under consideration by the circuit court, fled from the state of Wisconsin, taking with him the trust property for the purpose of defeating, impairing, and prejudicing the rights and remedies of the relator, had been thereafter served with a true copy of said judgment, and had failed to comply with its commands, a writ of attachment for contempt was issued returnable before the court on January 12, 1909. Attached to this affidavit and made part thereof was a copy of the judgment, which decreed that the defendant within thirty days after the service upon him or upon his attorney of written notice of the entry of judgment deposit with the clerk of said circuit court certain bonds of the United States and a certain amount of money, or in lieu of said bonds the sum of $10,000 with the money mentioned, and that in case of his failure to make said deposit the relator might have execution against the property of the defendant in the sum of $12,133.80 and the costs of the action. The defendant was arrested and held to bail to answer for his appearance on this charge of contempt of court, and thereafter the defendant

moved to vacate the writ of attachment on the ground that he was brought into the state of Wisconsin from the state of Tennessee by extradition proceedings based on a criminal complaint and warrant issued out of the municipal court of Manitowoc county on a charge of embezzlement of this same property. The defendant was arrested on the attachment for contempt in the presence of the municipal court and immediately upon his release on bail and without opportunity for him to return to the state from which he was extradited. The circuit court, upon the authority of *Moletor v. Sinnen*, 76 Wis. 308, 44 N. W. 1099, and on this showing, discharged the attachment.

The relator appeals to this court and seeks to distinguish the case from *Moletor v. Sinnen, supra,* on the ground that the defendant here was at the time he absconded a resident of Wisconsin and had not since acquired a residence elsewhere, and that the circuit court had, prior to his departure from Wisconsin, obtained in the equity suit jurisdiction of the subject matter and of the person of defendant, and that the defendant was guilty of the crime of embezzlement as well as of contempt of court. But the case cited was decided upon the hypothesis that the defendant was guilty and that he had withdrawn himself from the state to avoid prosecution, and was a fugitive from justice in the legal sense of that term. There does not seem to be any substantial distinction as regards immunity from arrest on civil process between that case and the instant case. The attachment in the instant case was issued to enforce a civil or private right of the relator, as appears from the facts above detailed. Sec. 3477, Stats. (1898); sec. 2565, Id.

Other matters relating to the form of judgment and referring to secs. 2965 and 2966, Stats. (1898), are urged in support of the decision of the circuit court, but we do not find it necessary to pass upon them.

By the Court.—The order of the circuit court is affirmed.

WILL OF PRASSER.

May 14—June 3, 1909.

Wills: Construction: Nature of estate created: Vested or contingent? Intermediate trust estate: Legal estates: Seisin: Dower.

1. In determining the nature of an estate created by will the will itself is to be first construed to ascertain the testator's intention, and afterwards the statute is to be consulted to ascertain how far the estate intended is affected thereby.
2. In the construction of a will the law leans, in doubtful cases, in favor of an absolute rather than a defeasible estate, and of a vested rather than a contingent interest.
3. While the general rule is that a gift will be deemed contingent when it is found only in a direction to divide at a future time, this is subordinate to the primary rule that the intent, to be collected from the whole will, must prevail.
4. A will gave the use of all testator's property to his widow during her life, and provided that after her death the property should be held in trust for ten years, the net income during that time to be divided equally among his children. It then provided that after the expiration of said ten years "all my estate and property then remaining in the hands of my said trustees I hereby give, devise, and bequeath unto all my children in equal parts, share and share alike." *Held*, that the interests of the children became vested at the time of testator's death, subject only to the life estate of the widow and the ten-year trust.
5. By "seisin" as the term is used in sec. 2159, Stats. (1898), relating to dower, is meant a fixed vested right of enjoyment of the estate, either immediately or at the termination of an intermediate estate.
6. Sec. 2159, Stats. (1898), gives dower out of legal estates only, as was the case at common law.
7. Under secs. 2036, 2087, Stats. (1898), when a trust in lands is created and the lands at the same time granted or devised subject to the execution of the trust, the trustee takes only such interest as the purposes of the trust require, and the grantee takes the entire title as against the world in general, and as against the trustee he takes the beneficial equitable interest subject only to the execution of the trust according to its terms.
8. A devisee who, under the will, took a vested remainder in fee in land of the testator, subject only to a life estate and to a subsequent trust limited to ten years, and who died after the

life estate had ended, was during his life "seised of an estate of inheritance" within the meaning of sec. 2159, Stats. (1898), and such estate being a legal estate as against all persons except the trustees, whose term was for years only, his widow was entitled to dower.

APPEALS from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Modified and affirmed.*

George I. Prasser died May 5, 1902, leaving a will, which was afterwards duly probated, and by which he gave the use of all his property to his wife during her life, and provided that after her death his executors should hold the entire estate in trust for ten years, using so much of the income as might be necessary for the maintenance of the property, keeping the real estate in good repair, paying all taxes thereon, and rebuilding any buildings that might be destroyed by fire, and dividing the net balance of the income "between my children, share and share alike." Then follows this provision:

"After the expiration of ten years after the death of my said wife, all my estate and property then remaining in the hands of my said trustees I hereby give, devise, and bequeath unto all my children in equal parts, share and share alike."

Prasser left real estate of the value of $50,000 and personal property of the value of $15,000. He was survived by a widow and seven children. The widow, Amalia Prasser, died September 9, 1902. Theodore Prasser, one of the children, died August 28, 1906, leaving a widow, *Helen Prasser,* and one minor child, *Clarence Prasser.* Amalia Seidentopff, a married daughter, died August 2, 1906, leaving her husband as her sole heir. The remaining five children are still alive. This proceeding was brought in the county court of Milwaukee county to construe the will. The county court held that upon the death of the testator the seven children took equal vested interests in the estate, sub-

ject to the life estate of the widow and the ten-year trust estate; that in case of the death of any child during the ten-year trust term his vested interest in real property would pass to his heirs and in personal property to his personal representatives respectively. *Helen Prasser* was denied any dower in the interest of Theodore Prasser. Upon appeal the circuit court confirmed this judgment, and the executors and trustees appeal. *Helen Prasser* also appeals from that part of the judgment denying her dower.

For the appellants the executors and trustees the cause was submitted on the brief of *Julius E. Roehr.*

For the appellant *Helen Prasser* the cause was submitted on the brief of *Harper & McMynn.*

For the respondent *Clarence Prasser* there was a brief by *Oscar M. Fritz,* guardian *ad litem,* and *Kronshage, McGovern, Goff, Fritz & Hannan,* of counsel; for the respondent *Fidelity Trust Company,* administrator of the estate of Theodore H. Prasser, deceased, and for the respondent *Helen Prasser,* there was a brief by *Harper & McMynn;* for the respondent *Ernst Seidentopff,* sole heir of the estate of Amalia Seidentopff (*née* Prasser), and as administrator of her estate, there was a brief by *Burke, Alexander & Burke;* for the respondent *Prudential Investment Company* there was a brief by *G. D. Goff;* and the cause was argued orally by *Mr. Goff.*

WINSLOW, C. J. The question upon the appeal of the executors and trustees is whether the estate vested in the children living at the time of the testator's death, or whether there will be no vesting of the estate until the end of the trust period, and then only in the children who shall then survive.

In determining the nature of an estate created by will, the will itself is to be first consulted and afterwards the statute. The operations should not be reversed. The will is to be first construed because the first and controlling question is, What

sort of an estate did the testator intend to carve out? and this can only be determined by construction of the will. After the testator's intention has thus been determined, the statute is to be consulted in order to ascertain how far the estate intended to be created by the testator is affected, limited, or inhibited by the law. It was said in *Smith v. Smith,* 116 Wis. 570, 93 N. W. 452, that:

"The primary canon in the construction of wills is that the intent is to be gathered from the whole will, rather than from the phraseology of any particular isolated clause. It is also well established that in doubtful cases the law leans in favor of an absolute, rather than a defeasible, estate, and of a vested, rather than a contingent, interest, and that, while the general rule is that a gift will be deemed contingent when it is found only in a direction to divide at a future time, this is subordinate to the primary rule that the intent, to be collected from the whole will, must prevail."

It was further said in the case of *Ohse v. Miller,* 137 Wis. 474, 119 N. W. 93:

"The gift will be held to vest, if such appears to have been the testator's intention, even though it be expressed in a mere direction to pay. . . . The real inquiry is whether the element of time is annexed to the gift itself as a condition precedent, or merely to the payment of it."

These principles are well settled, nor are they in any respect doubted, but rather recognized, in the case of *In re Moran's Will,* 118 Wis. 177, 96 N. W. 367, which is much relied on by appellants. Applying them to the present case, we have no difficulty in concluding that the testator intended the interests of his children to vest at the time of his death, subject only to the life estate of the widow and the ten-year trust. The words of the devise are words of a present grant, not of mere direction for division at a future date. The net annual income is to be divided among the children during the entire period of the trust, showing the intention that the beneficial enjoyment should begin as soon as the life estate should be

concluded, and the devise is "unto *all* my children." These features are all indicative of an intention to vest a present interest in each child at his death, rather than to suspend the vesting until the end of the trust period.

Passing to the question of *Helen Prasser's* right to dower, it is to be remembered that at the time of her husband's death the life estate had ended, and only the existence of the ten-year trust prevented the husband from entering into the actual possession of his interest, which, as we have seen, was already vested. Our statute gives a widow dower in all lands of which her husband was "seised of an estate of inheritance" at any time during coverture. By "seisin" is meant a fixed vested right of enjoyment of the estate either immediately or at the termination of an intermediate estate. 1 Washb. Real Prop. (6th ed.) § 116. At common law there was no dower right in a reversion or remainder after a freehold estate, unless the freehold estate terminated during the life of the husband; but there was dower in a reversion or remainder after an estate for years. 1 Washb. Real Prop. (6th ed.) § 365. At common law, also, there was no dower in an equitable estate. The husband must have had legal title. Id. § 374. In England and in many of the United States this latter rule has been changed by statute, and dower given out of equitable estates. Id. § 375. Our statute, however, says nothing of equitable estates, and doubtless is to be regarded as simply giving dower out of legal estates, as was the case at common law. Sec. 2159, Stats. (1898); 1 Scribner, Dower (2d ed.) ch. 19, § 20 *et seq.*, p. 400.

In the present case the husband's interest had vested at the testator's death, the life estate of the widow of the testator had ended during the husband's life, and the trust, limited to the term of ten years, alone intervened before the husband's right of possession would become perfect. Under these circumstances, was the husband during his life seised of an estate of inheritance? Sec. 2086, Stats. (1898), provides that

in case of a valid express trust the whole estate shall vest in the trustees *"except as herein otherwise provided,"* and that the *cestui que trust* shall take no interest in the land, but may enforce the trust. Sec. 2087 provides, however, that:

"The preceding section shall not prevent any person creating a trust from declaring to whom the lands to which the trust relates shall belong in the event of the failure or determination of the trust, nor shall it prevent him from granting or devising such lands subject to the execution of the trust; and every such grantee shall have a legal estate in the lands as against all persons except the trustees and those lawfully claiming under them."

From the two sections taken together it must result that when a trust in lands is created, and the lands at the same time granted or devised subject to the execution of the trust, the trustee takes only such interest as the purposes of the trust require, or, as frequently expressed, only such interest as is necessary to feed the trust, and the grantee takes the entire title as against the world in general, and as against the trustee he takes the beneficial equitable interest, subject only to the execution of the trust according to its terms. *Baker v. Estate of McLeod,* 79 Wis. 534, 48 N. W. 657. Such was Theodore Prasser's interest here. It was vested, subject only to the execution of the trust, and was a "legal estate" as against all persons except the trustees, whose term was for years only. Why should not his widow have dower in this legal estate? We have discovered no good reason for a negative answer to this question, and hence conclude that she should have been awarded dower in her husband's vested interest in the real property of the estate. So long as the trust exists, this means, of course, only a one-third interest in the net annual rents of the real estate after the purposes of the trust have been fully performed.

By the Court.—Judgment modified so as to provide that the trustees shall pay to *Helen Prasser* annually one third of the net rents, profits, and income derived from Theodore

Prasser's one-seventh interest in the real property of the estate, and the balance to the general guardian of *Clarence Prasser,* and, as so modified, the judgment is affirmed on both appeals: one bill of costs to be taxed by respondents and paid out of the estate.

WEIRICH, Plaintiff in error, vs. THE STATE, Defendant in error.

May 14—June 3, 1909.

Construction of penal statutes: "Public highways:" Toll roads: Automobiles: Speed.

1. A penal statute is open to construction when there is reasonable uncertainty as to its meaning.
2. In case of there being two or more equally reasonable meanings of a penal statute, that one is to be regarded as expressing the legislative will which is the least severe as regards previous conditions.
3. The rule of strict construction of a penal law is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose.
4. The term "public highway," in the broad ordinary sense, includes every common way for travel by persons on foot or with vehicles rightfully used on highways, which the public have the right to use either conditionally or unconditionally.
5. The term "public highway" in a limited sense means a way for general travel, which is wholly public.
6. In the general sense the term "public highways" includes toll roads; in its limited sense it does not.
7. The term "public highway" in a general law should be regarded as having been used by the legislature in its general sense unless there is some efficient reason for believing it was used in the limited sense.
8. A general law, regulating the operating of automobiles upon public highways in the interest of public safety, rather suggests use of the term "public highway" in the general than the particular sense, since the danger of personal injury is quite as great and immunity therefrom is quite as important as to travelers on the one as the other.

[Syllabus by MARSHALL, J.]

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

Writ of error to the municipal court of Milwaukee county to review a conviction for violation of sec. 3, ch. 305, Laws of 1905.

The law claimed to have been violated made operating an automobile upon any "public highway" within the corporate limits of any city or village, at a speed exceeding twelve miles per hour, an offense punishable by a fine of not less than $10 and not more than $25. The cause, by consent, was tried without a jury. The proof showed the accused to have violated the statute, if Whitefish Bay Road—a toll road located within the corporate limits of the village of East Milwaukee and owned and operated by a private corporation under ch. 350, P. & L. Laws of 1869—is a public highway within the meaning of sec. 3, ch. 305, Laws of 1905. The trial court held in the affirmative on that proposition and rendered the judgment in question accordingly.

For the plaintiff in error there was a brief by *Ryan, Ogden & Bottum,* and oral argument by *L. M. Ogden.*

For the defendant in error there was a brief by the *Attorney General, A. C. Backus,* district attorney, and *Norman L. Baker,* assistant, of counsel, and oral argument by *Mr. Baker.*

MARSHALL, J. The following is the statute under consideration:

"No person or persons shall use, operate, ride or drive any automobile or other similar motor vehicle along or upon any public highway of this state within the corporate limits of any city or village at a speed exceeding twelve miles per hour. . . ." "Any person who shall violate the provisions of," etc., "shall be punished by a fine of not less than ten dollars and not more than twenty-five dollars. . . ." Secs. 3, 8, ch. 305, Laws of 1905.

It may well be conceded, as claimed by counsel for plaintiff in error, that where the meaning of a penal law is obscure

so the legislative purpose is discoverable only by aid of rules for judicial construction, and there are two or more meanings which are equally within the scope of the language, that one least severe is to be regarded as the one intended, unless it appears, satisfactorily, in the light of all legitimate aids in the matter, that some other of such meanings was intended. In other words, strict construction in favor of the person sought to be penalized should prevail. That is too elementary to need to be more than stated.

It is a mistake to suppose that a penal statute is, necessarily, to be strictly construed so as to minimize its otherwise severity, as might be thought by the often unguarded statements of the rule,—because a statute does not always necessarily have to be construed at all. As has often been said, judicial construction is only invokable to solve uncertainties. So where there is no ambiguity there cannot, legitimately, be judicial construction. *Rice v. Ashland Co.* 108 Wis. 189, 192, 84 N. W. 189; *Rossmiller v. State,* 114 Wis. 169, 178, 89 N. W. 839. Vattel's rule in this regard, by reason of its universal approval, has the force of written law:

"It is not allowable to interpret what has no need of interpretation. Where the meaning of a law is evident, to go elsewhere in search of conjecture in order to restrict or extend the act, would be an attempt to elude it, a method which if once admitted, would be exceedingly dangerous, for there would be no law, however definite and precise in its language, which might not by interpretation be rendered useless."

It is also a mistake to suppose, in case of a penal statute being ambiguous, that the one of two meanings which are within the scope of the language used that will render it the least severe is to be regarded as embodying the legislative idea. As before indicated, given an ambiguous law, and uncertainty as to which of two or more meanings reasonably within the scope of the language thereof, from the point of view from which observation should be taken, was intended, then and

then only does the elementary rule as to strict construction come into play as an instrumentality for solving the difficulty. *Miller v. C. & N. W. R. Co.* 133 Wis. 183, 113 N. W. 384.

The foregoing stated principles were expressed in *Miller v. C. & N. W. R. Co., supra,* referred to in the attorney general's brief, thus: "The idea of strict construction does not suggest attributing an unreasonable meaning."

As a companion rule to that as to strict construction of a penal law, we have the one that such a law as well as any other is to have a reasonable, sensible construction, so as to effect, so far as practicable, the legislative purpose (*Miller v. C. & N. W. R. Co., supra*), and the further very general rule that in construing an enactment observation thereof should be taken from the point of view of the mischiefs to be prevented, of the whole of the enactment and every part thereof, the subject matter, the effect and consequences, and the reason and spirit (*Ogden v. Glidden,* 9 Wis. 46; *Harrington v. Smith,* 28 Wis. 43; *Hartford v. N. P. R. Co.* 91 Wis. 374, 64 N. W. 1033; *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 79 N. W. 422).

Applying the foregoing to the case in hand there is no serious difficulty in reaching a satisfactory result. The term "public highway," in its broad popular sense, includes toll roads—any road which the public have a right to use even conditionally, though in a strict legal sense it is restricted to roads which are wholly public. Elliott, Roads & Streets (2d ed.) § 8; Mills's Thompson, Highways (4th ed.) 7; *Neff v. Reed,* 98 Ind. 341; *Rogers v. Bradshaw,* 20 Johns. 735, 742; *Pittsburgh, M. & Y. R. Co. v. Comm. ex rel. Att'y Gen.* 104 Pa. St. 583, 586; *Northern Cent. R. Co. v. Comm.* 90 Pa. St. 300, 302; *Fox v. Union T. Co.* 59 App. Div. 363, 69 N. Y. Supp. 551; *Dodge Co. Comm'rs v. Chandler,* 96 U. S. 205, 208; *Bonaparte v. C. & A. R. Co.* 3 Fed. Cas. 821, 829; *Craig v. People ex rel. Nevill,* 47 Ill. 487, 493; *Comm. v. Wilkinson,* 33 Mass. 175; *Murray v. Berkshire Co. Comm'rs,*

53 Mass. 455, 458; *Pickard v. Howe,* 53 Mass. 198, 208; *State v. Maine,* 27 Conn. 641.

In the numerous cases cited we find very many laws treated where it was held that a toll road is included in the term "public highway." In *Neff v. Reed, supra,* it was held that such a term in the drainage law of Indiana includes a toll road. In *Craig v. People* it was said that, in the general sense, toll roads are public highways notwithstanding they are subject to the toll burden. The public has the same right to use them, subject to the toll exaction, for general travel as ordinary highways. In *Dodge Co. Comm'rs v. Chandler, supra,* the federal supreme court held that a toll road is a public highway because the public have a right to use it and that the charge of a toll in no way affects its character as a public highway. In *Comm. v. Wilkinson, supra,* an indictment for encroaching upon a public highway, which was a toll road, was sustained. In *State v. Maine, supra,* the nature of the action and the result was the same as in the preceding cited case, the court saying:

"A road constructed and supported by a turnpike corporation differs in no essential characteristic from a common highway, established and supported by a town, a borough, or a city. Their origin and objects are identical. Both emanate from the same supreme power, acting through the legislature, the courts, or other depositaries of authority designated by the laws. Both are called into existence, and supported, to subserve, in exactly the same way, the public necessities and convenience, and both alike are intended to endure for an indefinite period . . ."—citing Massachusetts cases above referred to holding that a toll road is a public highway.

Now is there any reason for holding that the term "public highway" was not used in the law in question in its broad general sense? It is suggested that an intent to use the words in a limited sense is inferable from the modifying word "public" in view of the fact that toll roads are differentiated from ordinary public ways in sec. 1895, Stats. (1898), by

its providing that upon the abandonment of a toll road by the owner it shall be deemed a public highway, and in sec. 1311*a*, Stats. (1898), providing for the acquirement by the public of toll roads for the purpose of making them public highways. It does not seem so. On the other hand, in view of the well-known need for regulation of the operations of the dangerous modern road machine, the word "public" seems quite as likely to have been used to broaden as to restrict the word "highway," so as to include all ways used by public right for public travel.

The manifest purpose of the law was to protect travelers upon public ways from being subjected to the peril created by unduly speeding automobiles thereon. It is just as important to afford such protection on toll roads as on ordinary public highways. There is no difference whatever.

Therefore, while recognizing that in some cases, by application of the rule of strict construction, the term "public highway" has been held to rather exclude than include toll roads, each case went upon its own particular circumstances and in some instances not very satisfactory reasoning. Few, if any, of the multitude of judicial authorities extant hold that the general meaning of public highways does not include toll roads. We have reached the conclusion that in passing the law in question the legislature, very clearly, contemplated furnishing a remedy, by way of prevention and punishment, for speeding with automobiles upon any public thoroughfare, where such speeding, if allowed, might imperil the personal safety of travelers,—that the term "public highway" was used in a sense as broad as the mischief to be guarded against, which was just as significant as to toll roads as ordinary highways.

By the Court.—Judgment affirmed.

SPICK, Plaintiff in error, vs. THE STATE, Defendant in error.

May 15—June 3, 1909.

Criminal law and practice: Jurors: Conscientious scruples: Circumstantial evidence: Instructions to jury: Evidence: Weight: Competency: Questions for court and for jury: Harmless errors: Homicide: Motive: Informer as to other offense by accused: Hearsay: Impeachment of witness: Rejection of his testimony by jury: Presumption of innocence: Degrees of murder: Instructions as to importance of agreeing on verdict.

1. A person called as a juror who discloses on the *voir dire* conscientious scruples against rendering a verdict on circumstantial evidence alone, may properly be rejected as incompetent, with or without objection by counsel.
2. While it would be well to specially instruct a jury on the subject of circumstantial evidence where the truth of a controversy is to be discovered partly or wholly from such evidence, omission to do so is not fatal error unless proper instructions in respect thereto are presented and rejected.
3. The rejection of evidence offered to prove that a person other than the accused committed the particular homicide in question is not harmful error, where it is manifest from the whole evidence that such person was in no way connected with the offense, in that he was not in the vicinity of the place thereof at the time of the occurrence.
4. Circumstantial evidence is an instrumentality in the administration of justice quite as legitimate as direct evidence for the establishment of an evidentiary circumstance, or the main fact in controversy in a judicial trial.
5. The degree of certainty respecting the existence of the main fact in controversy in a judicial trial, in order to warrant a finding in favor of the party affirming such existence, is the same where the evidence relied upon is partly or wholly circumstantial as where it is direct.
6. The weight of evidence to establish an evidentiary circumstance, and the weight of such circumstance as evidence when established, is for the jury.
7. Whether evidence offered tends to establish an evidentiary circumstance, or such circumstance to establish the main fact in controversy, is a question for the court. The decision in that regard, being in the field of mere competency, should not be disturbed on appeal unless manifestly wrong, the matter to be

viewed having regard to the superior advantages of the trial over the reviewing court for determining such question.

8. In case the evidence, whether wholly circumstantial or not, produces a conviction to a moral certainty—that is, beyond a reasonable doubt—in the minds of the jury of the existence of the ultimate fact in controversy, a verdict is due accordingly the same as if conviction with like degree of certainty were produced by direct evidence.

9. It is proper, though not necessary, in instructing a jury in a criminal case, where conviction is dependent partly or wholly on circumstantial evidence, to use this language or something similar: The accused is entitled to an acquittal unless the evidence satisfies the jury to a moral certainty of the existence of all the material circumstances; that they are consistent with guilt and inconsistent with any other reasonable hypothesis.

10. In a criminal case it is sufficient to instruct the jury in any appropriate language, as to the degree of certainty of guilt requisite to a conviction, to the effect that: In order to warrant a conviction each and all of the material circumstances and the fact of guilt should be established to the satisfaction of the jury beyond every reasonable doubt.

11. Proof of motive is not essential to a conviction in a prosecution of a person upon a charge of his having committed a criminal offense, but circumstantially it is of more or less weight as to the material fact according to the nature of the situation; and in a case resting wholly upon circumstantial evidence the presence or absence of motive may well be the deciding factor.

12. In a prosecution for a criminal homicide dependent upon circumstantial evidence, as bearing on the question of motive of the accused for doing the deed of which he is accused, it is competent to show that prior to the homicide the deceased reported that the accused had, to his knowledge, committed another offense, in the absence of any direct evidence that the accused knew who was the informant, if, from all the circumstances, it is reasonably inferable that he did know in fact, or had good reason to believe and did believe, the deceased to be his accuser; consideration of such evidence to be dependent upon belief of the jury that the defendant did, in fact, know or believe before the homicide that the deceased was the informer.

13. In case a decision by a trial court on the question of competency when made was wrong, but is right viewed from the standpoint of the whole evidence at the close of the trial, the error is harmless.

14. A jury may be instructed that the evidence on the part of the state tends to establish its claim and that on the part of the defendant the contrary, it being made plain that the real right of the matter is wholly for them to determine from all the evidence produced.
15. A witness may be impeached by proving by the evidence of other witnesses that his evidence is false; also by proving he has made statements out of court inconsistent with those made under oath in court. But a jury should not be instructed that if they believe from all the evidence that the testimony of any witness is false they may reject it, as if they had discretion whether to reject or not reject such evidence, nor be instructed that whether to reject such evidence or not is conditioned upon whether the same is corroborated by other credible evidence.
16. Belief upon the whole evidence that the testimony of any witness is false precludes the existence of its being corroborated by any credible evidence so as to be entitled to be believed. Any suggestion to the contrary involves absurdity and is to be avoided because of danger of the subject being confused with the rule of *falsus in uno, falsus in omnibus.*
17. If the jury believe that any witness has wilfully testified falsely respecting any material matter, they may, if they see fit, but are not bound to, reject all of such witness's evidence on that ground alone, where not corroborated by some other credible evidence.
18. A person on trial, charged with having committed a criminal offense, is presumed to be innocent; and such presumption entitles him to an acquittal till overcome by evidence establishing his guilt to the satisfaction of the jury beyond a reasonable doubt.
19. In case of a criminal homicide manifestly committed by an act imminently dangerous to human life, and indicative of depravity of mind and disregard of human life, so characterized as to show the grade of the offense to be murder in the first or second degree, any circumstance sufficient, reasonably, to at least cause reasonable doubt as to whether the act was pursuant to a formed design to take human life, warrants finding a verdict of guilty of murder in the second degree.
20. In case of belief from the evidence beyond a reasonable doubt that the accused is guilty of the offense of criminal homicide in either the first or second degree, but there is reasonable uncertainty between the two degrees, though belief of guilt of the offense at least in the second degree, a verdict of guilty in such degree is proper.
21. A jury may properly be admonished of the importance of agreeing upon a verdict and told, if such appears reasonably to the

trial judge to be the situation, that the evidence is not so voluminous or hard to understand, but that a conclusion can be reached one way or the other within a reasonable time, and that such result is expected, care being taken not to suggest which way is proper or to go further than to stimulate appreciation of jury duty.

[Syllabus by MARSHALL, J.]

DODGE, J., and WINSLOW, C. J., dissenting, are of the opinion that it was prejudicial error in this case to admit evidence that the deceased had reported to a third person that the accused had committed another offense (see par. 12, *supra*),—such evidence being pure hearsay and there being no other evidence that the accused had committed such other offense and no evidence warranting an inference that he knew or suspected that the deceased had given such information.

ERROR to review a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiff in error was informed against as having, on the 28th day of August in the year 1907, at the county of Bayfield, in the state of Wisconsin, feloniously, wilfully, and with his malice aforethought, killed and murdered Boni Lombard. He was in due form tried on such charge, found guilty of murder in the second degree, and duly sentenced to be punished by confinement at hard labor in the state prison at Waupun for the period of twenty years, the first day of such period to be solitary confinement.

A writ of error was, in due form, sued out to review the case on exceptions duly saved. The facts are stated in the opinion.

John Walsh, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

MARSHALL, J. The place of the homicide was in a sparsely settled wild country in which the plaintiff in error and the deceased lived. The latter was the sole occupant of a homestead claim, called the Morrison homestead, about a mile and

a half from the nearest neighbor. He did a little farming, but spent his time, mainly, in hunting and fishing and entertaining persons who resorted to that region for the purpose of fishing. The deceased resided with his employer, one Barnes, who lived about a mile and a half from the Morrison homestead and did a farming, lumbering, saloon, and general store business. There were only three other persons, all homesteaders, living in that locality. Barnes had been acquainted with the deceased for about nineteen or twenty years, and during the two years prior to the homicide had employed him as a foreman in the woods and as a farm hand. The accused and the deceased were addicted to drinking intoxicating liquor somewhat to excess, though the habits of the latter in that regard were not so pronounced for a short time before the homicide as formerly. He and the accused were well acquainted. The latter had been in disrepute with Barnes and the deceased for a considerable time before the homicide. Some incidents had recently occurred which increased the bad repute, particularly the fact that Barnes had lost cattle and it had been reported to him that the accused had killed and made away with them. The accused distrained one of the cattle because of its trespassing upon his premises, and Barnes compelled him to release the animal. The deceased was partly of Indian blood. There were a number of that blood who lived not far away and some were accustomed to work for Barnes under the direction of the deceased. For some days before the homicide the deceased had charge of a crew of Indians putting up hay for Barnes at a point where, in going thereto and returning therefrom, by the shortest and usual route, he had to pass the place where the accused lived. The day before the homicide the latter, the accused, and two others went fishing on a lake, using a boat. They had liquor along and the accused drank to such excess that he fell out of the boat into the water. About 4 o'clock in the afternoon his associates took him home, changed

his clothes, and put him to bed. The deceased was last seen alive going in the direction of the Morrison homestead about 6 o'clock on the following morning. Between 3 and 4 o'clock in the afternoon of that day the accused visited the Barnes place and reported that Lombard had been killed. He stayed there until 6 o'clock and in the meantime drank to excess. He bought some groceries and started home with them in a sack. Later he was found lying beside the road in a drunken stupor about a mile from his destination and was assisted to regain his feet and accompanied home. To the person who assisted him to his feet he remarked, "I was just as liable to lay there as I did with Boni." In the meantime, two men went from Barnes's place to investigate the report as to the death of Lombard and found his body in the road about forty feet from the Morrison house. A bullet from a rifle had passed through his upper right side, apparently killing him almost instantly. There was a trail of blood from the body for a distance of seventy to eighty feet to a pile of lumber just outside a window, near the southwest corner of the house, at which point there was evidence of considerable blood having been lost, and there was a whisky jug belonging to the accused, marked with blood and dirt. There were indications that a rifle shot had recently passed through the wire screen in the window, fired from inside the house in the direction of the place where it seemed the deceased was when shot. On the bed in the house lay defendant's rifle, with indications that it had recently been discharged. A rifle belonging to the deceased, of the same caliber as the other, was found a short distance from where he was apparently shot, but there were no indications that it had been recently discharged. The jug was full of whisky and in the house on the morning of the homicide. When found it was nearly empty. There was evidence establishing without controversy, or tending to establish, all these circumstances and others of a more or less incriminating nature, including some statements of the

accused, from which it was inferable that he was the guilty party, while there was other evidence from which it was claimed it was inferable that some other person did the deed. The accused after returning home drunk, as before stated, on the day of the homicide remained there till the next morning sleeping off his debauch. In the meantime several persons, attracted to the place by the report of the homicide, were about the premises, including the two men who first went to investigate the matter. They remained watching the body till the next morning, when there was a coroner's inquest and it was removed.

The story of the accused was, that upon waking up after sleeping off his debauch of the day before the homicide, he went on a fishing trip of several miles and at his destination used a particular boat; that he returned in the afternoon about 1 o'clock and, upon finding the body of the deceased in the road, put down his sack of fish at the side of the house and went to the Barnes place and reported the fact. There was circumstantial evidence that his story was false, such as there being no sack of fish found at the side of the house by any one attracted to the place by the report of the homicide before the accused returned from the Barnes place, and the boat he claimed to have used on the fishing trip not having been disturbed on the day of the homicide.

Several errors are assigned, not argued in the brief of counsel for the accused, though some of them were mentioned incidentally, or argued briefly, on the oral argument. We will pass them with this mention thereof and with the statement that they have received sufficient attention to satisfy the court that neither of them is material.

The court properly sustained a challenge of a juror because he testified to having conscientious scruples against convicting a person of a capital offense on circumstantial evidence alone. Such a person is manifestly incompetent for jury duty. By the law of the land, which every citizen is bound

to support, and every juror before being competent to sit in a case is so specially bound by his solemn oath, it is as legitimate to judicially establish a fact by circumstantial as by direct evidence, and it is as much the duty of a juror to act according to the weight of the former as to act according to the weight of the latter. A person might as well say, generally, he has conscientious scruples against obeying the law of his country as to say he has such scruples against acting as a juror upon circumstantial evidence in a capital case. Such a person has too much conscience, so to speak, for the best of citizenship. More properly speaking, he has that species of conscience with that grade of weakness that often makes the coward mistake his timidity for that conscience which is worthy of distinction.

It is suggested that in view of something said or decided in *Kollock v. State,* 88 Wis. 663, 60 N. W. 817, the court committed error by not instructing the jury on the subject of circumstantial evidence, though no request was made in that regard. We do not find anything in that case so holding. The difficulty there was that the trial court not only omitted to give any instructions in the general charge, specially on the subject of circumstantial evidence, but refused to give instructions embodying correct legal principles in respect to the matter, requested by counsel for accused. While it would be well to give such instructions in any case like this, it is a matter so largely within the discretion of the trial judge that omission to do so cannot be regarded as ground for reversal, unless the omission is in face of a proper request for such instructions.

One Beauregard was called as a witness for the state to prove that he found the accused in a drunken stupor beside the road where, as before stated, he had fallen or lain down while returning from the Barnes place after having been there and reported the homicide. An attempt was made on cross-examination to show he had ill will toward the deceased and had

threatened to kill him, as bearing on the probability that he, instead of the accused, was the guilty party. The offer was not made as bearing on his credibility, but as direct evidence of motive for taking Lombard's life. The questions were ruled out as not proper cross-examination. If the ruling were improper, and we do not suggest it was not, it was harmless, since there was positive undisputed proof that the witness was at work some over a mile from the place of the homicide when it occurred.

The claim is made that the evidence being all circumstantial, and there being indications that some other person than the accused might have committed the homicide, the jury were not warranted in finding the circumstances pointed so strongly to the accused as the one who did the deed, as to exclude every reasonable hypothesis to the contrary. We shall not take time to go over the evidence in detail. It has been stated in a general way and sufficiently for the purpose of this assignment of error.

True, it was improper to convict the accused unless the evidence established the material evidentiary circumstances beyond a reasonable doubt, and all such circumstances pointed so unerringly to the accused as the guilty party as not to be reasonably reconcilable upon any other reasonable theory than that of his guilt. But the degree of certainty in such a case is no greater than in one resting wholly upon direct, or partly upon direct and partly upon circumstantial evidence. The subject was discussed at considerable length in *Schwantes v. State,* 127 Wis. 160, 106 N. W. 237, where occasion was improved for correcting the erroneous notion that circumstantial evidence should be viewed with such distrust as to be inefficient in face of mere conjecture or possibility of incorrectness of its indications, upon the theory that to be efficient it must establish guilt with some appreciably higher degree of certainty than direct evidence. Experience shows that the former is quite, if not more likely, to lead to a wrong result than the latter.

An eminent commentator on the criminal law, speaking on this subject, very aptly thus pictures the misunderstanding sometimes found to exist:

"Much embarrassment has arisen over the position advanced by two eminent text-writers, that, to justify the inference of legal guilt from *circumstantial* evidence, the existence of inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Judges, on hearing these expressions, have been very apt, in the hurry of a trial, to accept and apply them; and hence have sprung up a series of *dicta* to the effect that circumstantial evidence is to be viewed with distrust, and that, to justify a conviction on circumstantial evidence, it is necessary to exclude every possible hypothesis of innocence." Whart. Crim. Ev. (9th ed.) § 10.

Speaking on the same subject, said WHITMAN, C. J., in *In re Thorn,* 6 Law Rep. 49, 54: "Circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud."

And GIBSON, C. J., in *Comm. v. Harman,* 4 Pa. St. 269, 271:

"Circumstantial evidence is, in the *abstract,* nearly, though perhaps not altogether, as strong as positive evidence; in the *concrete* it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility."

We repeat the summing up in the *Schwantes Case,* 127 Wis. 160, 177, 106 N. W. 237, 243:

"Evidentiary facts established by evidence more or less direct pointing logically to the ultimate subject of search, have always been, and must necessarily always be, essential instruments in the administration of justice, and when established as they all should be, with the same degree of certainty as the ultimate fact is required to be established, they do not fall below, in probative force, direct evidence. One is as competent

as the other to prove the real subject matter of the inquiry. From such evidentiary facts we reason inductively. Certain *indicia* are known by experience to characterize human actions. Those concomitant with any particular act being ascertained with the degree of certainty required as to the main fact, the latter, we reason logically, must necessarily exist also. Such process of reasoning goes to the ultimate point of inquiry with well-nigh, if not quite, the certainty of exact demonstration. We first conjecture that the subject of search exists and is discoverable. We prove its concomitant facts according to human experience and by the illumination thus produced we dissolve the mist characterizing the conjecture and bring into definite outlines that which was before hidden. *People v. Kennedy,* 32 N. Y. 141. If the picture thus disclosed to our view is the only one that can reasonably exist under the circumstances we stamp it, so to speak, as the truth of the matter to a moral certainty—the highest degree of certainty attainable in human affairs. *People v. Harris,* 136 N. Y. 423, 429, 33 N. E. 65. So it is said that 'certain laws of moral conduct operate almost as infallibly as the mechanical laws of the material world.' "

Courts, very properly, in giving instructions in cases of this sort, say commonly, substantially:

You should not render a verdict of guilty unless after a careful consideration of all the evidence in every reasonable aspect, each material circumstance is established beyond a reasonable doubt and they are unexplainable upon any reasonable hypothesis other than that the accused is guilty; in other words, unless all material circumstances are consistent with his guilt, establishing it with such high degree of certainty as to exclude any reasonable theory that any other person did the deed.

Thus enlarging on the subject is not to be regarded as a requirement because of any specially inherent infirmity in circumstantial evidence, but as indicating the care which it is appropriate and quite becoming for the judge to exercise in presiding upon so grave an occasion; as a method of emphasizing the rule that an accused is entitled to go free un-

less his guilt is established beyond a reasonable doubt, and of admonishing the jury, on account of the very serious nature of the consequences that might otherwise follow, to proceed with great consideration and care, avoiding so far as practicable all possible danger of giving way at any point to mere suspicion. After all said, the degree of certainty required is covered by admonishing the jury that the accused is entitled to an acquittal unless guilt is established to their satisfaction beyond any reasonable doubt.

Applying the foregoing to the evidence, it is the opinion of the court that the incriminating circumstances which the evidence tended to establish sufficiently to make the existence or nonexistence of each of them a jury question, *i. e.* sufficiently to render it competent for the jury to find as to each in favor of the state beyond a reasonable doubt, made a network around the accused so complete as to justify the jury in finding that it singled him out as the only person concerned, criminally, in the homicide and the one who committed it beyond any reasonable doubt.

Barnes was permitted to testify that the deceased told him the accused killed his cattle and that, subsequently and before the homicide, he told the accused he had been so informed, but did not tell him who imparted the information. There was no direct evidence that the accused, previous to the homicide, knew the deceased was the informant. The evidence was permitted to go to the jury, with all the other evidence in the case bearing on the question of whether there was any ill feeling between the accused and the deceased, furnishing any motive for the former to do the deed of which he was accused. In connection with the evidence there was the circumstance that the deceased was Barnes's foreman—the one most likely to have investigated respecting the loss of the cattle and to have aroused Barnes's suspicion of the accused, if he did not convey direct information to him, that the latter was the suspected party, and, further, the circumstance that

the deceased was so circumstanced that the accused when informed by Barnes, as aforesaid, quite likely knew, or strongly suspected, that the informant was the deceased, and the further circumstance, which the jury had a right to believe from the evidence existed, that the deceased and the accused had serious trouble shortly before the homicide, trouble that moved the latter to declare, in effect, a few days after the homicide that the deceased deserved what he got. There was the further circumstance of absence of any reasonable explanation of such intense feeling of the accused towards the deceased as to cause him to use such expressions other than knowledge or belief on his part that the deceased had become possessed of the secret as to who killed the cattle and had imparted it to Barnes. It was in view of the whole situation, including what has been detailed and other evidentiary suggestive circumstances bearing on the question of whether the accused before the homicide knew, or had good reason to and did believe, that the accused was Barnes's informant, that the evidence was permitted. It was offered and received, not as evidence that the accused killed the cattle, but that he had been accused by the deceased of having done so, and, therefore, had a motive for the homicide. That was made abundantly plain to the jury at the time the evidence was received and was emphasized by what occurred during the argument to the jury.

The district attorney in the course of his address argued that circumstances indicated that the accused knew before the homicide that the deceased, and only he, was in possession of the secret about the shooting of the cattle. That was objected to, whereupon the district attorney conceded there was no direct evidence to that effect, but insisted that it was a legitimate deduction to make from the whole evidence that he in fact did know of it, and that the trouble between him and the deceased, some time before the homicide, resulted therefrom. With that explanation the court said, in effect, that he would permit such theory to be argued to the jury. Thus they must

have understood, from the district attorney, and the court as well, that whether the evidence complained of was entitled to any weight as bearing on the question of motive depended on whether, from all the circumstances, they concluded that the accused knew or suspected who had informed on him.

It was certainly competent to show motive of the accused for the homicide. Motive is not essential in such a case, but presence or absence of it is an evidentiary circumstance bearing, with more or less weight according to circumstances, on the question of guilt. In a case resting, as this does, wholly on circumstantial evidence, presence or absence of motive may well be the deciding factor. So if the evidence in question was improper, it was manifestly prejudicially so.

It being proper for the state to show motive for the homicide and by circumstantial evidence, would not the fact, if it be a fact, that the accused killed the cattle and to his knowledge the deceased knew and had informed Barnes of it, or the fact, if it be a fact, that the accused knew the deceased believed and had reported to Barnes that he killed the cattle, particularly by reason of the character of the accused and the debauchery immediately preceding the homicide, afford some reasonable explanation of how he might either have conceived the idea of killing the deceased and lay in wait for him where he could safely and surely accomplish the homicidal purpose by shooting from the inside of the house through the screen at the open window, or had some altercation with him about the cattle, preceding or during which the jug of whisky played a part and was partly emptied by both, or by the accused and, following that, after the deceased left the house and proceeded a little distance might have fired at him through the screen at the open window or in some other way, being so intoxicated as not to have a definitely formed design to kill, have done the fatal deed.

In the situation stated the question presented to the court on the objection to the evidence was one of competency. In

other words, to determine whether the evidence complained of, under all the circumstances, tended, reasonably, to show that the accused knew before the homicide that the deceased was the one who had informed on him, or believed he was the one. If so, whether the evidence was sufficient to so show, was for the jury. If it bore legitimately, in any reasonable view of it, on the question, it was within the field of competency. That is one of the most difficult situations, in many cases, which a trial court has to deal with. It involves a question of fact and permits of a very wide range of judgment, reaching to the very boundaries of reason. Hence the rule that the decision of a trial court on such a question cannot properly be held wrong on appeal unless it is clearly so, and whether it is or is not, is to be determined in face of the fact that a trial judge, ordinarily, is in a much better position than an appellate court to decide such a matter. It is manifest that error in such a ruling must appear very plainly from the written history of the trial to warrant holding that error was in fact committed. This court has often so held. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145; *Hupfer v. Nat. D. Co.* 119 Wis. 417, 427, 96 N. W. 809; *Kavanaugh v. Wausau,* 120 Wis. 611, 618, 98 N. W. 550, 553

In the last case cited the court said:

"The question of competency respecting evidence is always one of law to be solved by the court." It might well have been said in connection therewith, underlying it, however, is the question of fact as to whether the evidence, if admitted, will tend to prove a fact in issue, or any evidentiary fact. "If the test to be applied in determining the first question was whether the evidence, if true, would in the mind of the trial judge establish the fact in controversy, it is obvious that the court, in ruling thereon, would often be called upon to determine questions of credibility and weight. Such is not the test. If evidence, in the judgment of the trial court, if true, will tend within reasonable probabilities to establish the matter in dispute according to the claim of the party of-

fering it, and there is a reasonable probability of the truthfulness thereof, the true test of competency is satisfied and the evidence should be admitted. . . . The court's decision in such matter, following the proper test, is regarded as a verity unless manifestly wrong. . . ."

From what has been said it is evident that the learned circuit judge, in admitting the evidence in question, applied the proper test. Precedent to the ruling he determined, considerately, in view of all the circumstances, the matter of fact involved in favor of the state, which required him to rule, as matter of law, to admit the evidence. Was the ruling on the matter of fact wrong, especially in view of the whole evidence as it stood when the case was submitted to the jury? If it were true that the circumstances were not sufficient at the time the ruling was made,—were not sufficient to warrant, reasonably, the belief that the accused knew before the homicide, the deceased was the one who had charged him with killing the cattle, but before the case closed the circumstances developed were sufficient,—the vice of the ruling was effaced.

After a careful consideration of the case in all its bearings it is the opinion of the court that the trial judge did not, manifestly, commit error in admitting the evidence complained of. It was not necessary to show by direct evidence knowledge of the defendant that the deceased was his accuser. It was as competent to prove that by circumstantial evidence as it was to thus prove any other evidentiary circumstance or the main fact.

It is not often easy to refer to judicial authority supporting a situation which is somewhat uncommon, but that does not, legitimately, suggest doubt as to its propriety where the principles involved are plain. Cases show merely application of principles. New combinations of circumstances call for new applications of old principles and result in the creation of new precedents. If courts were to feel lost as to what to do when out of sight of precedents they would be quite in-

efficient to satisfy fully their great function as administrators of justice.

The case cited to our attention by the attorney general, *People v. Chin Hane,* 108 Cal. 597, 41 Pac. 697, is a very clear illustration of the principles we have discussed. It is on all-fours with this case. For the purpose of showing motive for the homicide, evidence was received, over objection, that the deceased went upon the bond of a third person who had been charged by the accused with having attempted to murder him. The ground of the objection was that there was no evidence that the accused knew, prior to the homicide, that the deceased was instrumental in his assailant's regaining his liberty after being arrested on the charge of attempted murder. The court, on appeal, said:

"The objection, we think, goes to the weight of the evidence, rather than to its competency. We think it fairly inferable from all the facts and circumstances that he was possessed of such information, but, if he had no knowledge of the fact, then the evidence was entirely harmless, and no injury to him could have possibly resulted from its admission."

We may well assume that, in making the last remark, the cause was submitted, as it was here, so the jury must have understood that the test of whether the evidence complained of was to be considered, was whether they believed, from all the circumstances bearing on the question, that the accused knew, before the homicide, of the act of the deceased which was offensive to him.

The learned circuit judge said to the jury:

"The evidence of the state tends to prove that defendant is guilty of murder in the first degree." But in connection therewith the court said: "The evidence of the defendant tends to prove he is not guilty. You must arrive at the truth from the evidence, and you will be governed by the evidence alone, in deciding the case. Your especial duty as jurors is to arrive at the truth from the evidence."

And also said:

"Certain evidence has been introduced here tending to prove that certain alleged admissions have been made." But also said in connection therewith: "The rule as to admissions or confessions is, that such evidence is the weakest kind of evidence and that such evidence, if taken at all by the jury, should be taken with great caution, but if the jury is satisfied that admissions have been actually made, then they should give such evidence the weight, when they consider the whole evidence, that they believe they should receive."

Counsel for the accused selected out of the charge the opening statement on each subject and in that way suggested that prejudicial errors were committed. We see no reason for the claim of counsel that the court gave undue prominence to the evidence against the accused over that in his favor or intimated to the jury, in the slightest degree, what weight they should give to any of the evidence. There is nothing in the instruction within the condemnation of anything said in *Ferguson v. Truax,* 132 Wis. 478, 491, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, or *Till v. State,* 132 Wis. 242, 248, 111 N. W. 1109.

There may be a difference of opinion as to the best way to refer to the fact that there is evidence to carry the question involved in such a case to the jury, and whether it is best to specifically refer to it at all. But, certainly, any man of sufficient intelligence to perform, properly, jury duty must know, in case of submission to him to find facts from conflicting evidence and inferences therefrom, that in one aspect it is supposed such evidence will admit of a finding one way and in another in a different way. Otherwise there would be no jury question to be solved. It is a common way for a trial judge to say, in terms or effect, there is evidence tending to support the claim of one side and evidence tending to support the claim of the other; it is your particular duty to reconcile the conflict and find the truth. And, certainly, there is at least no harmful error in such common method of

submitting a cause, though the way of stating the matter best calculated to avoid giving the jury any idea of a judicial purpose to intimate what weight should be given to the evidence upon either side of any controverted matter admits of considerable difference of opinion. In that field trial judges do, and should, have a large measure of discretion.

The second part of the instruction above quoted, if faulty at all, is too favorable to the accused. We will not discuss that part of the charge but leave it by saying that, perhaps, the trial judge was a little overcautious in favor of the accused in some of the language used. It is not thought best to pass it with such approval as to suggest use of the same language in the same or similar circumstances.

The jury were instructed thus:

"(1) A witness may be impeached by proving that the testimony that he has given is false, or he may be impeached by proving that he has made statements on material facts different from what he has sworn to in court. (2) You should not reject the testimony of any witness, without due consideration and reasonable grounds therefor. (3) It is your duty to consider the interest of the defendant, or any other witness, if you find that any other witness is interested in fact, in the result of this trial, as going to the credibility of such witnesses. (4) If you should find, when you consider the whole evidence, that the testimony of any witness is false, it may be your duty to reject the testimony of such witness, unless it is corroborated by some credible evidence."

In addition to this and entirely separate from it the court gave correctly the rule on the subject of *falsus in uno, falsus in omnibus.*

It is strenuously argued that the first period, which was segregated from its context for the purpose of an exception, is erroneous and condemned in *Colbert v. State,* 125 Wis. 423, 104 N. W. 61. We fail to find any such instruction in that case. The one condemned was entirely different. The one here is the same as was given in *Miller v. State,* 139

Wis. 57, 119 N. W. 850. We advise against using language so liable to be challenged as erroneous. It was not given in this case and was not in the former with intent to state the rule of *falsus in uno, falsus in omnibus,* for that was given, as before indicated, in another and quite different part of the charge.

True, a witness may be impeached by proving that his testimony is false. A jury need not be told that; it is so self-evident. True, also, a witness may be impeached by proving statements made by him out of court are inconsistent or contradictory of those made under oath in court. Those methods of impeachment are laid down in all elementary works on evidence. Jones, Ev. § 847; Greenl. Ev. § 461; Taylor, Ev. § 1470. So that part of the charge excepted to, by itself, is faultless. But why was it followed by the statement, "If you find, when you consider the whole evidence, that the testimony of any witness is false, it *may* be your duty to reject the testimony of such witness, unless it is corroborated by some credible evidence?" Why was it suggested to the jury that they had discretion whether to reject or give weight to testimony believed by them to be false? Of course, they must reject such testimony. And why was feasibility of corroborating utterly false testimony by credible evidence so as to render the former worthy of being given credence in discovering the truth, suggested? As said in the *Miller Case,* rejection of testimony of a witness believed to be false does not fall within the principle as to permissible rejection of all of a witness's evidence because of some material part of it being wilfully false. The improper use of the word "may" and the improper addition of the words respecting corroboration, led counsel to conclude here, as it did before, that the language of the court was an erroneous statement of the rule of *falsus in uno, falsus in omnibus.* The improper addition made the whole involved in such absurdity, as said in the *Miller Case,* that no sensible juror could reasonably have

been misled by it. The very existence of testimony believed upon a consideration of the whole evidence to be untrue, excludes, utterly, any possibility of there being corroborating evidence entitling the false evidence to credence. The fabled Cassio, in his misfortune, though uncertain which was his right and which was his left hand, yet appreciated that neither could be both.

The jury were instructed that:

"The burden of proof rests upon the state from the beginning to the end of the trial, and defendant, when placed upon his trial, was presumed to be innocent."

We see no error in that. The better way is to say, in connection with what was said: Such presumption continues from the beginning to the end of the trial and entitles the accused to an acquittal, unless overcome by evidence establishing his guilt, to the satisfaction of the jury beyond a reasonable doubt. *Emery v. State,* 101 Wis. 627, 78 N. W. 145.

But the language used seems to mean that, with sufficient clearness to leave the accused without reason to complain, since no more plainly worded rule was requested.

It is urged that in no event can the conviction properly stand because the accused was, manifestly, guilty of murder in the first degree or not guilty; that there is no reasonable ground in the evidence for belief in a killing by the accused without design to produce that result. The border line between murder in the first degree and murder in the second degree is very plain in statutory characterization, but whether it is one or the other is often very difficult of determination on the evidence. So it has been said that if the jury, in any given case, conclude from the evidence that the accused is guilty beyond a reasonable doubt of either one or the other of two offenses, and they are not wholly convinced that it is the greater, they should find a verdict of guilty of the lesser. *Ryan v. State,* 115 Wis. 488, 92 N. W. 271; *Miller v. State,* 139 Wis. 57, 81, 119 N. W. 850, 860.

To warrant the jury in rendering the verdict they should have come to the conclusion upon evidence rendering such conclusion reasonable that there was at least a reasonable doubt as to whether the accused was guilty of the highest homicidal offense, but none as to whether he committed an act imminently dangerous to the deceased, causing his death, evincing a depraved mind regardless of human life without any premeditated design to effect such result. Sec. 4339, Stats. (1898). There were some circumstances in this case, seemingly within reason, satisfying that test. Manifestly, there was the act imminently dangerous to the deceased. There was plenty of evidence of depravity of mind and disregardfulness of human life. There was proof of the long debauch, tending to show a condition of inability to form, or improbability that there was formed, any specific design to take Lombard's life. There was no evidence of any very adequate motive to move a man, even one of as low degree and depraved by liquor as the accused was, to form a wicked design to take human life. The presence of the jug, which was full of whisky in the morning, but out of doors nearly empty immediately after the homicide, with some indications that it was in possession of the deceased at the time he was shot, or that it was in contact with him immediately afterward, is not without its significance. There is such a dense mystery as to just what occurred at the time of the homicide—as to the real characteristics of it,—including the events immediately preceding the fatal shot, that one might hesitate to say death was, beyond a reasonable doubt, effected pursuant to a premeditated design to kill. May not the jury reasonably have entertained from the evidence a fair doubt on that question? Their answer as to that was approved by the learned trial judge. It requires a strong case, made wholly by a written history of a trial, to warrant an appellate court in overruling such a decision. It is the opinion of the court that no such strong case appears here.

The following cases sufficiently point to the last conclusion,

if any support by way of judicial precedents is required: *Clifford v. State,* 58 Wis. 477, 17 N. W. 304; *Flynn v. State,* 97 Wis. 44, 72 N. W. 373; *Odette v. State,* 90 Wis. 258, 62 N. W. 1054; *Eckert v. State,* 114 Wis. 160, 89 N. W. 826; *Johnson v. State,* 129 Wis. 146, 108 N. W. 55. It would seem that there was more shadowy ground in each of such cases for believing the accused was guilty of murder in the second instead of murder in the first degree than in this. In each death was caused by one or more bullets being fired into a vital part of the body under circumstances indicating some provocation and some circumstances reasonably causing doubt as to whether the shot was fired pursuant to a formed design to effect death, and impairing the presumption of such design springing from intentional discharge of the firearm aimed at such vital part.

The next day after the case was submitted to the jury they requested further instructions and pursuant thereto the court instructed them at length to the effect that, commonly, the prosecution, and the defense as well, in the trial of a case have to resort to circumstantial evidence; that it is a legitimate method of establishing the truth; that justice could not be otherwise administered; and further instructed them as to the scope of the term "beyond a reasonable doubt," and said:

"The evidence which you are compelled to pass upon is not so complicated and so voluminous and difficult to understand that a jury should not arrive at the truth within a reasonable time."

"I can see no reason, gentlemen, why you should not agree upon a verdict in this case, and we expect you to do so."

"The real question for you to determine in this case is, what is in fact the truth."

It is argued that the quoted language contained a pretty plain intimation that the evidence tended strongly to establish the guilt of the accused and to impress the jury that they were under some measure of coercion to find a verdict accordingly, and to do so without much further delay. The

opinion here is otherwise. True, as the learned judge said, the evidence was not voluminous, nor very difficult to understand. That was manifest to the commonest understanding. But the inferences that might be legitimately drawn therefrom were left to the jury with scrupulous care. True, also, it was manifest that there was no very good reason why the jury should not reach a conclusion within a reasonable time. No suggestion was made to them that they had deliberated an unreasonable time or how much additional time would be reasonable before coming to a conclusion one way or the other. That was left wholly to them.

It is not infrequent that jurors fail to fully realize their high duty to reason with each other, to compare opinions, and to each be considerate of the views of his fellows, leading to undue hesitation in reaching a verdict or failure to reach one at all. Wise judicial supervision of a trial, in that regard, is necessary and is none too often exercised. Manifestly, the court should be mindful of where that duty ends and the duty of the jury begins so that an attempt to discharge the former will not invade the latter. The trial judge in his legitimate field has very broad discretion, and it needs a pretty plain case of prejudicial overstepping of it to warrant condemning the result as tainted with harmful error. *Odette v. State,* 90 Wis. 258, 264, 62 N. W. 1054.

The jury in this case must be presumed to have been men of ordinary intelligence. As such they probably understood from what the court said that a verdict of acquittal or guilty would be received without judicial question of its correctness.

The language complained of was certainly as faultless as that used in *Schwantes v. State,* 127 Wis. 160, 191, 106 N. W. 237, or that used in *Odette v. State,* 90 Wis. 258, 263, 62 N. W. 1054, where the court, among other things, admonished the jury that it was their duty to harmonize the evidence if possible; that they ought not to stand back obstinately, "but should reason together and talk over the exist-

ing differences, if any;" "that it was their duty to meet the testimony in a spirit of fairness and candor with each other;" "to reason together and apply the law as given by the court to the facts in the case, and arrive at some kind of a verdict." That was quite as strong as, "I can see no reason, gentlemen, why you should not agree upon a verdict in this case, and we expect you to." "Render a just verdict," said the court, "without being influenced by prejudice, passion, fear, or favor, and then you will have done your duty to the defendant, to yourselves, and to society." That expression and others in the charge must be looked at in determining whether the jury in any reasonable probability were improperly influenced by the language complained of. It is the opinion of the court that the trial judge was well within his proper field in using such language.

There are two or three other points, briefly presented in the printed argument, but they do not seem to be of sufficient moment to warrant extending this already quite lengthy opinion for the purpose of discussing them. The accused seems to have had a very fair trial and to have been ably defended by a member of the bar appointed for that purpose. The record is exceptionally free from error, and wholly free from harmful error. All of the instrumentalities of the law of the land have been gratuitously at the disposal of the accused to safeguard him against being convicted unjustly. The law has run its full course, and he has had all the advantages he could have had, had he been of high degree and possessed of wealth. If he has been unjustly convicted, which is highly improbable, it is one of the inevitable individual sacrifices for the good of the whole which must, now and then, be the result of any system of law of human origin.

By the Court.—The judgment is affirmed.

DODGE, J. (*dissenting*). I am reasonably satisfied that, with one exception, all the assignments of error might fail of fatal effect upon the conviction, though not always upon

the grounds stated in the opinion of the court. There is one, however, which seems to me glaringly erroneous and unavoidably prejudicial. Barnes was permitted to testify, in substance: "I was informed, before the homicide, that *Spick* killed some of my cattle. Boni Lombard informed me." So far as this tended to arouse belief in the jury that defendant, at some remote period, had been guilty of killing cattle, it was mere vilification, and a most unworthy and improper method of prejudicing the accused, in a case of much doubt as to whether he was the person who among all the vicinage committed the obvious homicide. *Paulson v. State,* 118 Wis. 89, 94 N. W. 771. Conceding, however, as my brethren think, that no such improper purpose moved the introduction of the evidence, and that its sole purpose was to prove animosity in defendant toward deceased either as an informer against him or as the custodian of his guilty secret, the error and prejudice are no less clear. Then the only possible material facts are that accused knew or suspected that Lombard had the knowledge or had given the information. But there is no word of evidence that accused either knew or had any ground of suspicion of such facts. The only ground suggested by the prosecution, or in the court's opinion, is that his own guilty consciousness would lead him to such suspicion. But this leaps the very gap which I think insuperable. He could have no such consciousness unless he in fact killed the cattle. That he did so there is absolutely no evidence, except the objectionable testimony of Barnes that Lombard told the latter so—pure hearsay and therefore necessarily inadmissible. *O'Toole v. State,* 105 Wis. 18, 80 N. W. 915; *Campbell v. State,* 111 Wis. 152, 160, 86 N. W. 855; *Baker v. State,* 120 Wis. 135, 149, 97 N. W. 566.

The argument in the court's opinion that admissibility of hearsay evidence may sometimes be sustained by peculiar facts, as to which great deference is due the trial court's decision, is met, primarily, by the circumstances that there

were neither facts nor evidence for the judicial mind to act on to justify hearsay testimony of the only facts from which animosity against the accused, or desire to put him out of existence, could be inferred. Another obstacle to the efficacy of such argument is, however, that the trial court made no such decision, as the record affirmatively discloses. He admitted the objectionable testimony, not on any circumstances thought to justify hearsay, but on the ground that "it is allowable to prove additional crimes . . . sometimes to show motive." That, however, has no relation to remote crimes, not connected with the one charged, and so dissimilar as to have no tendency to evince persistent similar special intent. Killing A.'s cattle years before has no tendency to prove the special intent in killing B.; nor is it admissible in proof of motive. *Baker v. State,* 120 Wis. 135, 145, 97 N. W. 566; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 19, 98 N. W. 923, 1016; *People v. Molineux,* 168 N. Y. 264, 297, 61 N. E. 286. Thus the trial court has conclusively certified that he in fact proceeded upon an erroneous conception of law, and has excluded the palliation for his admission of this evidence so laboriously invented in the opinion of the court.

I cannot avoid the conclusion that in the respect mentioned error was committed, obviously prejudicial to accused, and must dissent from the affirmance of the conviction.

WINSLOW, C. J., concurs in the foregoing dissenting opinion.

PRINSLOW, Plaintiff in error, vs. THE STATE, Defendant in error.

May 15—June 8, 1909.

Embezzlement of money: Evidence: Variance: Demand, when necessary: New trial: Supreme court.

1. There is no material variance between an information charging embezzlement of sixty dollars in money and proof that defendant received a check for a larger sum in payment of sixty dollars upon a debt to a corporation of which he was president; that he paid the difference to the debtor and deposited the check in a bank in his own name; and that he afterwards drew the money from the bank.
2. Proof of a demand for money alleged to have been embezzled is necessary only where a demand is necessary to show the fraudulent conversion embraced in the offense.
3. Sec. 4719, Stats. (1898), vests in the supreme court a broad and liberal discretion in ordering a new trial in criminal actions where the justice of the case demands.
4. A new trial is directed by the supreme court although it had been denied by the trial court, in a prosecution for embezzlement, where the only evidence of fraudulent conversion was defendant's failure to report the collection of money for a corporation of which he was president, and it appeared that shortly after he collected it he applied the money, together with some of his own, upon an obligation of the company, and evidence discovered after the trial would have tended to prove that at the time in question the corporation was largely indebted to him.

ERROR to review a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The plaintiff in error, *F. O. Prinslow,* hereinafter called defendant, was tried in the circuit court for Fond du Lac county upon an information charging him with having on the 24th day of November, 1906, in the county of Fond du Lac, embezzled $60 in money, the property of the Prinslow & Watson Implement Company, a domestic corporation,

whose principal office was in the city of Fond du Lac, in said county. The jury returned a verdict of guilty in the manner and form charged in the information. Motions were made in arrest of judgment and for a new trial, which were denied, and the defendant sentenced to be punished by payment of a fine of $150, together with costs of prosecution, and in default of payment to be imprisoned in the county jail of Fond du Lac county until said fine and costs be paid, not to exceed a period of six months.

Among other grounds for a new trial is assigned newly discovered evidence, and several affidavits were used upon the motion tending to show that at the time of the alleged embezzlement the Prinslow & Watson Implement Company was indebted to the defendant in a large sum of money; that upon an account stated between defendant and the Prinslow & Watson Implement Company covering a period from July 3, 1906, to and including January 5, 1907, said account showed a balance in favor of defendant against said company of $2,628.07; that on the 9th day of February, 1907, a trustee in bankruptcy of defendant was duly appointed and an action brought by said trustee against the Prinslow & Watson Implement Company to recover the sum of $2,628.07, and said action settled by the payment of $100 to the trustee on December 14, 1907, and that it was insisted and claimed in said action that the Prinslow & Watson Implement Company was indebted to the defendant at the time he was adjudged a bankrupt in the sum of $2,628.07, but that it was believed said company was insolvent and that a judgment against it could not be collected, and therefore a settlement was made for $100. It further appears from the affidavits that during the period from July 3, 1906, to January 5, 1907, the defendant was not indebted to said company in any sum upon settlement of accounts between them. Other facts are set up in the affidavits tending to show that due diligence was used to discover the facts in ref-

erence to said indebtedness and condition of accounts between defendant and said Prinslow & Watson Implement Company, and also with reference to the suit brought by the trustee in bankruptcy of the defendant against said Prinslow & Watson Implement Company, but that at the time of trial defendant and his counsel were wholly ignorant of these facts and did not discover them until after verdict. The affidavits further show that defendant was a man of very little education, had no knowledge of bookkeeping, and had nothing whatever to do with the keeping of the books of the Prinslow & Watson Implement Company, and that none of the entries were made by him; that the newly discovered evidence would have had controlling influence upon the jury, strongly tending to produce a verdict of not guilty.

Execution was stayed, and defendant removed the record here by writ of error.

Maurice McKenna, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *F. T. Tucker,* assistant attorney general, and oral argument by *Mr. Tucker.*

KERWIN, J. The defendant at the time of trial was a married man, thirty-seven years of age, born in Fond du Lac county, Wisconsin, where he had lived all his life. He seems to have borne a good reputation, at least up to about the time of the alleged offense. The Prinslow & Watson Implement Company named in the information was incorporated in July, 1906, August Prinslow being vice-president, J. N. Watson secretary and treasurer, and the defendant president, which office he held until January 3, 1907, at which time he was forced into voluntary bankruptcy.

1. It is first assigned as error that the proof does not support the charge. The information charged the embezzlement of $60 in money, and it is claimed that the proof was predicated upon the receipt by the defendant and conversion

of what was known as a "milk check" for the sum of $68.93, drawn by one Peter Stephany to the order of one J. P. Bierschbach. This check was delivered to the defendant in payment of $60 upon an indebtedness of the holder of the check to the Prinslow & Watson Implement Company, the defendant paying the balance of the amount of the check, $8.93, to the holder. The defendant then deposited the milk check in the bank and received the value of it, $68.93, so that he did in fact shortly after receipt of the check get into his possession the value of the check, and, if he was guilty of embezzlement by the transaction, he embezzled the money to the amount of $60, proceeds of the check, less the $8.93 paid by him to the holder. Before the check was cashed by the defendant he had an interest in it to the extent of $8.93 and the corporation $60. The defendant deposited the check in his own name with other money, and during the month drew the money out of the bank. He admits that he had the $60 and paid it upon a check for $100.73 drawn by the company, paying the balance of the check, $40.73, out of his own money. It is clear, we think, that there was no material variance between the information and the proof, because upon the evidence, if any embezzlement were committed, it was under the proof an embezzlement of money. *Secor v. State,* 118 Wis. 621, 95 N. W. 942; *Comm. v. Gateley,* 126 Mass. 52; *People v. Hanaw,* 107 Mich. 337, 65 N. W. 231.

2. Error is assigned because no demand was shown for the money alleged to have been embezzled. The crime of embezzlement embraces the fraudulent conversion of the property embezzled, and where it is necessary to make a demand in order to establish a conversion a demand is necessary. Sec. 4418, Stats. (1898); *Kossakowski v. People,* 177 Ill. 563, 53 N. E. 115; *Fitzgerald v. State,* 50 N. J. Law, 475, 14 Atl. 746; *State v. Reynolds,* 65 N. J. Law, 424, 47 Atl. 644; *Secor v. State,* 118 Wis. 621, 95 N. W. 942; *Dix v. State,* 89 Wis. 250, 61 N. W. 760; *State v. Heiden,* 139

Wis. 519, 121 N. W. 138. Sec. 4419, Stats. (1898), which makes "the refusal or wilful neglect of any officer or other person" to pay over money *prima facie* evidence of the embezzlement thereof, is relied upon by the plaintiff. This statute manifestly has reference to cases where a demand is necessary, and in that event the statute makes the demand only *prima facie* evidence of embezzlement, leaving the question of fraudulent conversion and proof respecting embezzlement undisturbed in cases where no demand has been made. It is the fraudulent conversion of the money that constitutes the offense, and that may be proved without a demand. *People v. Ward,* 134 Cal. 301, 66 Pac. 372; *Wallis v. State,* 54 Ark. 611, 16 S. W. 821.

3. Error is also assigned on refusal of motion for a new trial. Aside from the newly discovered evidence set up in the motion for a new trial, the evidence of embezzlement is exceedingly weak. Practically the only evidence upon the question of fraudulent conversion is the failure to report the collection of the $60, which failure was explained by the defendant. Moreover, the evidence shows that the defendant was endeavoring to meet the obligation of the company, which at the time was in a rather straitened financial condition. He applied the $60 collected on an obligation of the company shortly after he collected it, together with $40.73 of his own money. Besides, had the newly discovered evidence been before the jury, it would at least have strongly tended to prove that at the time of the alleged embezzlement the Prinslow & Watson Implement Company was indebted to the defendant on account in a large amount, and under such circumstances, together with the other evidence, it is difficult to see how the jury could have convicted the defendant. We therefore think that upon the whole record the court below should have granted a new trial. Sec. 4719, Stats. (1898), provides that the circuit court may grant a new trial "for any cause for which by law a new trial may be granted or

when it shall appear to the court that justice has not been done, and on such terms and conditions as the court may direct." This section further provides:

"When an application for a new trial under this section shall be refused a writ of error shall, on the application of the defendant, be issued from the supreme court to bring such matter before it; and upon such writ the supreme court shall have the power to review the order refusing to grant a new trial and render such judgment thereon as it may deem proper."

This statute vests in this court a broad and liberal discretion in ordering a new trial when the justice of the case demands. In *Lonergan v. State,* 111 Wis. 453, 456, 87 N. W. 455, 456, this court said:

"In criminal cases, and especially in a prosecution for a capital offense, the defendant has a clear right to have his guilt determined by the court as well as by the jury. 'If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial.' The accused has the right to have 'the solemn opinion of the judge who tried the cause, after a careful hearing of all that may be alleged against its justice, that it ought to stand.' *Ohms v. State,* 49 Wis. 415, 5 N. W. 827. Not only has he this right to the solemn judgment of the trial judge, but he has also the right upon writ of error, if the question is properly presented by the record, to demand the deliberate opinion and judgment of this court upon the question whether his guilt was sufficiently proven."

Error is assigned upon the charge. As to whether or not there is reversible error in the charge the members of this court are not agreed. Since the question presented under this head is not likely to arise upon another trial, we shall refrain from discussing it. We are of opinion that justice demands that a new trial should be granted.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

MARKLEY, Plaintiff in error, vs. THE STATE, Defendant in error.

May 15—June 3, 1909.

Intoxicating liquors: Sale without license: Evidence: Reading to jury: Consent.

1. A conviction of selling intoxicating liquors without a license is *held* to be sustained by the evidence in this case.
2. After retiring, the jury returned into court announcing a disagreement upon a certain point. Counsel for the defendant suggested that the testimony of the complaining witness on that point was undisputed and consented that it be read, but, after the court had ordered it read, asked to have all the other evidence read, and on refusal thereof by the court objected to the reading of the testimony first mentioned. *Held*, that it was not error to permit the reading of such testimony, counsel for defendant having himself invited it.

ERROR to review a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

L. H. Bancroft, for the plaintiff in error.

For the defendant in error the cause was submitted on the brief of the *Attorney General* and *A. C. Titus,* assistant attorney general.

TIMLIN, J. The plaintiff in error contends that the verdict is contrary to the evidence given upon the trial, and that the court erred in its instructions to the jury and in permitting the court reporter to read to the jury from his notes the testimony of the complaining witness. The plaintiff in error was charged with having, on August 30, 1908, sold intoxicating liquors and drinks to one Thomas Mead without having first obtained a license. The evidence on the part of the state consisted of an admission by the plaintiff in error that he had no license, and the testimony of Thomas Mead, a boy sixteen years old, to the effect that he was at the place

in question, which was formerly and up to about July 7, 1908, a licensed saloon, at three different times on August 30, 1908; once in the forenoon about 10 o'clock and once about noon, and the third time in the afternoon. At this third visit, which was on his return from a baseball game, he claims to have received from plaintiff in error a drink and also a half pint of whisky. His testimony is somewhat uncertain. In one place he testifies that he called for a half a pint of Red Top whisky right in the presence of *Adam Markley,* Robert Ferguson, and Perry Poole. Immediately in connection with this he testifies:

"I told Jim, and Jim told *Ad.* Jim and I walked up from the ball game. Jim Markley he and I walked up from the ball game together, and I told him as I walked up that I wanted it. I told him that I wanted a half pint of Red Top whisky before we got to the building. I didn't call for anything in the building. He told his father and he gave it to me. He whispered it to his father over the bar. Jim Markley was there at the same time Ferguson and Poole was. He went right on through the building. That was after I had this drink. *Ad Markley* filled up the bottle and gave it to me after Jim whispered to him."

The witness testified that after this purchase he went toward the river, where there were boys swimming, and the evidence is not disputed that he had a bottle of whisky in his pocket at this swimming place, which some of the boys took out of his pocket and carried to a justice of the peace. The sheriff searched the premises in question a day or two after, and the only intoxicating liquor he found in the place was a keg of port wine, which had been tapped, and another keg of blackberry brandy, which had not been opened. The plaintiff in error denied the sale to the complaining witness, stating that there was nothing in the saloon room but cherry cider and orange cider and red and white pop and ginger ale and raspberry on the day of the alleged sale to the complaining witness. He came from his home to the saloon

building about 9 o'clock on the day in question and remained there perhaps three or four hours, and his son, James Markley, Bob Ferguson, and Perry Poole were also there. He denied that James Markley whispered to him over the bar and denied selling or giving any intoxicating liquor to the complaining witness. James Markley testified to the same effect, and added that he did not see the complaining witness in the saloon on Sunday afternoon, that Bob Ferguson and Perry Poole drank temperance drinks there that day, and that he was down to the ball game and returned from the game with the complaining witness, but the latter did not stop at the saloon building; did not go inside. Clark Weller saw complaining witness around the saloon building almost all day, but he did not come in more than once, but this witness was not in the saloon in the afternoon. *Adam Markley,* recalled, testified that he was not in his place of business at all on the day in question after the ball game started. Perry Poole testified that he was in this saloon building on the 30th of August for a few minutes with Bob Ferguson and he got something to drink; got what they called for, cherry cider. This was before the ball game, and he was not in the place after the ball game. Robert Ferguson was not in the place after the ball game.

This is the substance of the testimony. Counsel for plaintiff in error places great stress on the testimony of the complaining witness to the effect that Ferguson and Poole were in the saloon building when he bought this bottle of whisky, and assumes this is a very damaging statement. We do not share in this view of the evidence. At one of the three visits of the complaining witness in the saloon on that day these two men were present, and the jury might well have found that the complaining witness was mistaken as to which time. There is no doubt a question of veracity between the complaining witness on one side and the two Markleys on the other, but that was for the jury under all circumstances.

After the jury had retired and had been some time in deliberation they returned into court and announced that they had not agreed upon a verdict, and reported that the disagreement was concerning the time of day at which the unlawful sale was supposed to have been made. The court indulged in some comments to the effect that his own memory was uncertain in that respect, and the counsel for plaintiff in error suggested that the undisputed evidence on the part of the complainant was that he bought the liquor at his third visit to the saloon building in the afternoon, after coming from the ball game, and consented that "the testimony should be read." The court thereupon ordered the reporter to read the testimony of the complaining witness. Counsel for plaintiff in error requested the court to "permit the other evidence to be read." The court answered: "No; I will not. You said the testimony of that boy was undisputed. I do not recall that the boy said that this whisky was got after the ball game, but I did not want to say so before. Now you may read the testimony." Defendant objected to the reading of such testimony. The testimony of Thomas Mead was again read to the jury by the reporter. We see no error in this proceeding, and we think that counsel for the accused himself invited the reading of the testimony.

Finding no reversible error in the record the judgment should be affirmed.

By the Court.—Judgment affirmed.

LUNDSTRUM, Plaintiff in error, vs. THE STATE, Defendant in error.

May 15—June 8, 1909.

Habeas corpus: *Review of evidence on preliminary examination: Complainant need not be examined: Directory statute: Confession.*

1. In a proceeding by *habeas corpus* to procure the discharge of one held for trial after a preliminary examination, the court can only examine the evidence sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate.
2. A legal preliminary examination may be had without calling the complainant as a witness, the provision in sec. 4786, Stats. (1898), that the magistrate shall examine him being directory merely.
3. A confession of guilt by the accused may be received and considered by the examining magistrate in connection with other evidence as tending to prove that an offense has been committed and that there is probable cause to believe the accused guilty thereof.
4. The evidence (including the confession) on the preliminary examination of one charged with murder is *held* sufficient to justify the magistrate in holding her for trial.

ERROR to review an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff in error, *Alberta Lundstrum,* was charged with having murdered one Otto E. Lundstrum. The order sought to be reviewed was one made in *habeas corpus* proceedings, and remanded her to her former imprisonment under the commitment by an examining magistrate.

For the plaintiff in error there was a brief by *Rubin & Zabel,* and oral argument by *W. B. Rubin.*

For the defendant in error there was a brief signed by *A. C. Backus,* district attorney, and *Carl Muskat,* assistant district attorney, and oral argument by *Mr. Muskat.*

BARNES, J. The plaintiff in error was arrested on a charge of murder in the first degree. A preliminary examination resulted in her being held for trial without bail. She seeks discharge from custody by *habeas corpus* proceedings on the ground that she was not legally committed. The following reasons are urged in support of her contention: (1) There was no legal preliminary examination because the complaining witness was not sworn thereat; (2) the evidence offered at such examination failed to establish the fact that a crime had been committed; and (3) an alleged confession of the accused was improperly received for the purpose of establishing the fact that a crime had been committed, and, excluding such alleged confession, the evidence offered was wholly inadequate to show the commission of a crime, or that there was probable cause to believe that the accused was guilty of an offense.

In the proceeding before us this court can only examine the evidence sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. If there was, relief must be denied. We cannot weigh the evidence to determine whether this court would reach the same or a different conclusion. *State ex rel. Durner v. Huegin,* 110 Wis. 189, 235, 85 N. W. 1046.

1. The contention that the plaintiff in error has not had a legal preliminary hearing because the complaining witness was not called to testify is untenable. This question was before this court in *Emery v. State,* 92 Wis. 146, 154, 65 N. W. 848, and it was there decided that the provision of sec. 4786, Stats. (1898), requiring the magistrate holding a preliminary examination to examine the complainant, was directory only, and that a legal examination could be had without calling such party as a witness. We feel no hesitancy in saying that the case was correctly decided.

2. We do not decide in this case that the fact that a crime has been committed may not be established on a preliminary

examination solely by evidence of a confession of guilt by the accused of the crime with which he has been charged. Some courts hold that a confession is not sufficient in itself to show the commission of an offense. We entertain no doubt that a confession may be received and considered by the examining magistrate in connection with other evidence as proof tending to show that an offense has been committed and that there is probable cause to believe the accused guilty thereof. 12 Cyc. 311; *People v. Cokahnour,* 120 Cal. 253, 52 Pac. 505; *U. S. v. Bloomgart,* 2 Ben. 356, Fed. Cas. No. 14,612. The case of *Ex parte Patterson,* 50 Tex. Crim. 271, 95 S. W. 1061, relied on by counsel for plaintiff in error, recognizes the rule that a "confession may be used to assist in making out the *corpus delicti.*"

3. It was clearly established that the decedent met his death as the result of gunshot wounds, and the only question upon which there could be any doubt was whether the evidence was sufficient to negative the idea that they might have been self-inflicted. The evidence showed that one of the wounds was almost instantly fatal, the pulmonary artery having been severed. The inference, to say the least, was quite strong that the other wound was made after the fatal shot was fired. It was in a position and the ball followed a direction that would almost conclusively demonstrate that the party who discharged the gun was not trying to commit suicide. Perhaps it would not be impossible for a suicide to discharge the revolver in the way in which it must have been discharged in order to produce the wound, but it would certainly be very improbable. The accused was found in the room with the deceased almost immediately after the shots were fired. She stated that he shot himself. When asked where the revolver was, she said she did not know, and it required considerable searching on the part of the police officers to find it; it being finally located behind a door, where it was evidently placed by some one aside from the deceased. In

addition to this, a week after the homicide the accused stated to an apparently disinterested person, without any suggestion on his part: "Just think, a week ago today at this time I shot Otto." The first name of the decedent was Otto. Unexplained, this statement would naturally be understood to refer only to Otto Lundstrum. Taking all of these facts into account, and bearing in mind the rule that this court can only examine the evidence sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate, we must hold that the order of the circuit court refusing to discharge the prisoner should be affirmed.

By the Court.—Order affirmed.

CASES DETERMINED

AT THE

August Term, 1909.

STATE EX REL. NORTHERN PACIFIC RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

March 31—October 5, 1909.

Railroads: Powers of Railroad Commission: Statutes construed: Crossing of tracks: Fixing place: Safety devices: Apportionment of expense: Condemnation proceedings: Compensation to senior road, what to include: Constitutional law: Power to amend charters: Vested property rights: Police power: Delegation of legislative power: Judicial power: Review of orders of Railroad Commission.

1. Ch. 454, Laws of 1907, and particularly sec. 1797—56, Stats., vests in the Railroad Commission power to determine the point at which, as well as the manner in which, the track of one railroad shall be crossed by that of another; and the question of compensation only is left to the commissioners appointed by the court under subd. 6, sec. 1828, Stats. (1898).
2. The law as it before existed respecting the right of a railroad company to designate its route was not abrogated by ch. 454, Laws of 1907.
3. The power of the state to alter or repeal existing charters of corporations cannot be used to take away property or rights which have become vested under a legitimate exercise of the powers granted by a charter.
4. A railway company which constructed its road while a statute (subd. 6, sec. 1828, Stats. 1898) was in force under which, as at common law, it could not be required to pay any part of the expense of making and maintaining any subsequent crossing of its track by the track of another railway, acquired thereby

a vested property right which cannot be taken for the benefit of another company without compensation, in the exercise of the reserved right to alter or amend charters.

5. To compel the senior railway company to pay any part of the expense occasioned by the crossing of its road by the junior company would be a taking of the property of the former; and such a taking without compensation to the senior company would not be a reasonable or valid exercise of the police power.
6. Sec. 1797—56, Stats. (Laws of 1907, ch. 454),—relating to crossings of railway tracks thereafter made, and providing that the Railroad Commission may prescribe the protective appliances to be maintained at such crossings and fix the proportion of the expense of constructing, operating, and maintaining such a crossing and protective appliances which shall be paid by the owners of said tracks respectively,—may reasonably be so construed as not to require the Commission to impose any part of the expense of the crossing upon the senior road which would result in a taking of its property without compensation; and in support of the validity of the statute it should be so construed.
7. When, pursuant to sec. 1797—56, the Railroad Commission imposes upon the senior road a part of the expense of constructing, operating, and maintaining a crossing of its tracks and the prescribed protective appliances, the senior road is entitled to recover in the condemnation proceedings before commissioners appointed by the court (under subd. 6, sec. 1828, Stats. 1898) all damages suffered by it by reason of the crossing, including damages on account of the burden or expense so imposed upon it by the Commission.
8. This provision of sec. 1797—56, that the Railroad Commission may apportion the expense of the crossing, is not a delegation of legislative power, or a vesting of judicial power in the Commission.
9. An order of the Railroad Commission will not be disturbed by the courts unless it is unlawful or unreasonable.
10. An order of the Railroad Commission apportioning the expense of a crossing, pursuant to sec. 1797—56, should leave the amount of damages occasioned by the crossing to be fixed by the commissioners appointed by the court in the condemnation proceedings under subd. 6, sec. 1828, Stats. (1898).

Per MARSHALL, J., *concurring:*

1. The right, in a general sense, to construct a railroad is referable to the certificate of public convenience and necessity, under secs. 1797—43 to 1797—53, Stats. (Laws of 1907, ch. 454).

2. The right to cross the tracks of a senior railroad is referable to subd. 6, sec. 1828, Stats. (1898).
3. The right to take the property of the senior road at the point of crossing is referable to said subd. 6, sec. 1828.
4. Authority to locate the place of crossing is referable to the implied power of the Railroad Commission under secs. 1797—54 to 1797—56, and the general spirit of the act of 1907, superseding by necessary inference subd. 6, sec. 1828, Stats. (1898), on that subject.
5. The manner of constructing the railroad, including the manner of making the crossing with its accessories, and the establishing of status in respect thereto to be dealt with in condemnation proceedings, is referable to the decision of the Railroad Commission under secs. 1797—54 to 1797—56.
6. The manner of acquiring property for the purposes of the road, including that of any other road at the crossing, is referable to secs. 1845–1851, and such other parts of ch. 87, Stats. (1898), as bear on the subject, the proceedings to that end to be subsequent to the determination by the Railroad Commission under secs. 1797—54 to 1797—56.
7. The commissioners in condemnation proceedings are required to deal with the situation created by the determination aforesaid making the owner of the senior road good by an award of a money equivalent for *such* appropriation of its property rights as shall be contemplated in view of such determination, including the cost of *such* grading, rails, frogs, switches, and other appliances used in constructing and maintaining the crossing, and maintaining and operating safety appliances, as shall be preliminarily entailed upon it in view of *such* determination.

BARNES, J., and WINSLOW, C. J., *dissenting*, are of the opinion:

1. So much of sec. 1797—56, Stats., as empowers the Railroad Commission to require the senior company to bear any portion of the expense of constructing a crossing proper is void because it deprives the company of its property without due process of law; but the invalidity of this particular provision does not affect the remaining portion of the act.
2. An order of the Commission, not imposing upon the senior company any part of the expense of constructing the crossing proper, but requiring it to defray one half of the expense of maintenance, is not erroneous in the absence of anything to show that such latter expense was a material item or that the half thereof would exceed the cost of maintaining the road at that point had no crossing been made.

3. Whether a crossing already exists or is to be made, the state, in the exercise of its police power, may require that it be safeguarded by protective appliances, such as interlocking plants, whenever in the exercise of reasonable judgment such devices are deemed to be required for the public safety or convenience, and may make any reasonable apportionment of the expense between the roads affected, without reimbursement to the senior company.
4. The legislative declaration requiring railway companies to install approved safety devices whenever necessary to protect life or facilitate commerce is implied in the language of ch. 454, Laws of 1907, and in view thereof the delegation of power to the Railroad Commission to determine the fact as to the necessity for such devices at a given point, and to apportion the expense thereof, is valid.
5. Sec. 1797—56, Stats., should not be construed as giving the senior company any right to recover from the junior, in condemnation proceedings or otherwise, the amount apportioned to and paid by such senior company for the construction or maintenance of safety devices at a crossing.
6. There is no limitation on the right of the legislature, under sec. 1, art. XI, Const., to repeal corporate charters, except the consciences of the legislators, and no limitation on the right of amendment, except the XIVth amendment to the federal constitution.

Appeal from a judgment of the circuit court for Dane county: E. Ray Stevens, Circuit Judge. *Modified and affirmed.*

This is a *certiorari* proceeding brought by the relator, *Northern Pacific Railway Company,* to set aside and declare invalid an order made by the *Railroad Commission of Wisconsin.* The matter was heard in the circuit court for Dane county upon a petition, writ of *certiorari,* and return thereto, and judgment was entered by the court below affirming the order of the *Railroad Commission,* from which judgment this appeal was taken.

It appears from the record before us that more than twenty years ago the Northern Pacific Railroad Company, the predecessor of the *Northern Pacific Railway Company,* relator herein, acquired for its main line from Ashland, Wis-

consin, to Duluth, Minnesota, and from Ashland to the Pacific coast, a right of way across the northwest quarter of section 2, township 42 north, of range 14 west, and also a right of way for a spur on Connor's Point, both in the city of Superior, Wisconsin. Tracks were constructed on these rights of way and have ever since been maintained as a part of the system of railways owned by relator and its predecessor. When these rights of way were acquired and the tracks constructed, subd. 6, sec. 1828, R. S. 1878, defining the powers of railroad corporations and relating to the crossing of tracks of railroads, provided:

"To cross, intersect, join and unite its railroad with any railroad heretofore or hereafter constructed, at any point on its route and upon the grounds of such railroad corporation, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections. And every corporation whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor or the points and manner of such crossings and connections the same shall be ascertained by commissioners to be appointed by the court, as is provided in this chapter in respect to acquiring title to real estate. But no corporation which shall have obtained the right of way and constructed its road at the point of intersection before the application for the appointment of commissioners may be made shall be required to alter the grade or change the location of its road, or be required to bear any part of the expense of making and maintaining such crossing or of such proceeding."

In 1907 the legislature of Wisconsin passed ch. 454, Laws of 1907, which contained the following provision:

"Sec. 1797—56. Every crossing of the track of a steam railroad hereafter made by the track of another steam railroad; and every crossing of the track of an electric or street railway surface road hereafter made at points outside the

limits of incorporated cities by the tracks of a steam railroad; and every crossing of the track of a steam railroad or of any other electric or street railway surface road hereafter made at points outside the limits of incorporated cities by the track of an electric or street railway surface road shall be above, below or at grade of the tracks proposed to be crossed as the *Railroad Commission* shall determine after hearing the parties upon reasonable notice prescribed by said *Commission*. In such determination, said *Railroad Commission* shall prescribe the kind and character of the protective appliances, if any, to be installed, operated and maintained at such crossings, and they shall also fix the proportion of the expense of originally constructing, operating and maintaining such crossing and of any protective appliances prescribed by them and the proportion of the expense of operating and maintaining the same which shall be paid by the owners of said tracks respectively. In case said commissioners shall not in the first instance require protective appliances to be installed at grade crossings made under this section, they shall after reasonable notice to and hearing of the parties, have power on application of either party interested in maintaining and operating said crossing, or on their own motion to require protective appliances to be installed, operated and maintained at such grade crossings and to fix the basis upon which the parties using such crossings shall bear and pay the cost and expense of constructing, operating and maintaining the same."

After the passage of the foregoing act the *Wisconsin & Northern Minnesota Railway Company* was organized under the laws of Wisconsin, and obtained from the *Railroad Commission of Wisconsin* a certificate of convenience and necessity for the construction of a line from the city of Superior across the double tracks of the relator known as the Newton Avenue line and across the track of the relator located on Connor's Point. Thereafter it filed its plans and specifications for the construction of its proposed railroad, showing grade crossings of the relator's tracks. A hearing was had before the *Railroad Commission*, and the *Commis-*

sion on May 26, 1908, made an order whereby it was determined and directed that the crossings be at grade; that the expense of constructing the crossings be paid by the *Wisconsin & Northern Minnesota Railway Company;* that after the construction of the crossings each company bear one half of the expense of maintaining and operating them; that an interlocking, derailing, and signal system be put in at the crossing of the double tracks; and that each company bear one half of the expense of constructing, maintaining, and operating such system. The relator opposed a grade crossing.

The evidence shows that, before the passage of ch. 454, Laws of 1907, in grade crossings it was customary for the junior road to pay the entire cost of constructing, operating, and maintaining the crossing and interlocking system. The position of the appellant here is that the order of the *Railroad Commission,* affirmed by the court below, charging it with any part of the expense of maintaining the crossing, or any part of the expense of the construction or maintenance of the interlocking, derailing, and signal system, is without authority of law and void, and that if ch. 454, Laws of 1907, be construed as authorizing the order of the *Commission,* it deprives the relator of its property without due process of law, contrary to the provisions of sec. 1 of the XIVth amendment to the constitution of the United States, and of sec. 13 of article I of the constitution of Wisconsin, and that if said chapter be constitutional and applies to the crossing of railroads constructed prior to its enactment, then there is no evidence to support the order of the *Railroad Commission* so far as that order directs the relator to bear any part of the cost of operating or maintaining the crossings or the construction or maintenance of the interlocking system; that the applicant, *Wisconsin & Northern Minnesota Railway Company,* never obtained any authority to enter upon or cross the tracks or rights of way of the relator.

Three cases are brought before us here by *certiorari* and

argued together, namely, the instant case, *State ex rel. Great Northern Railway Company v. Railroad Commission, post,* p. 181, 121 N. W. 932, and *State ex rel. Lake Superior Terminal & Transfer Railway Company v. Railroad Commission, post,* p. 182, 121 N. W. 932. The contentions in each of these cases are substantially the same. The decision, therefore, in this case will be decisive of the other two.

For the appellant there was a brief by *Louis Hanitch,* attorney, and *Charles W. Bunn* and *Charles Donnelly,* of counsel, and oral argument by *Mr. Hanitch* and *Mr. Donnelly.*

For the respondents there was a brief by the *Attorney General* for the *Railroad Commission,* by *Luse, Powell & Luse,* attorneys for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the *Wisconsin & Northern Minnesota Railway Company,* and by *Alfred H. Bright,* of counsel; and the cause was argued orally by *Mr. L. K. Luse* and *Mr. Bright.*

The following opinion was filed June 3, 1909:

Kerwin, J. 1. It is contended on the part of each relator, but especially by the Great Northern Railway Company and the Lake Superior Terminal & Transfer Railway Company, that the proceedings to obtain a certificate of convenience and necessity were premature, because the point of crossing should have been first determined and the right to cross obtained before such certificate was granted. This contention involves the construction of the acts of the legislature set out in the statement of facts.

Subd. 6, sec. 1828, Stats. (1898), provides that if the corporations cannot agree upon the amount of compensation to be made "or the points and manner of such crossings and connections the same shall be ascertained by commissioners to be appointed by the court, as is provided in this chapter in respect to acquiring title to real estate." It is insisted that this provision is still in force, and that the point of cross-

ing must be so determined by commissioners appointed by the court, and not by the *Railroad Commission*.

Sec. 1797—56, Stats. (Laws of 1907, ch. 454), provides that "every crossing of the track of a steam railroad hereafter made by the track of another steam railroad . . . shall be above, below or at grade of the tracks proposed to be crossed as the *Railroad Commission* shall determine." And it further provides that in such determination the *Railroad Commission* shall prescribe the kind and character of the protective appliances, if any, to be installed, operated, and maintained at such crossings. Sec. 1797—40 provides for the application for certificate of convenience and necessity within six months after the publication of the articles of association, and sec. 1797—41 provides that no railroad corporation shall make application for such certificate unless it shall have caused a copy of its articles of association to be published in one or more newspapers within six months prior to the time of making the application. Sec. 1797—43 provides that every application for a certificate of convenience and necessity shall be accompanied by complete maps and profiles of the line of the proposed road, which shall be filed with the application, and that prior to granting or refusing the certificate the *Railroad Commission* shall have the right to permit errors, omissions, or defects in the application, maps, and profiles to be supplied or corrected, and also to permit changes in the proposed route where deemed desirable. Secs. 1797—45, 1797—46, and 1797—47 provide for hearing counsel and taking evidence in support of or in opposition to the application. Sec. 1797—48 provides that upon conclusion of the hearing of the application, if the *Commission* or a majority of them shall find that the proposed road would be a public convenience and that a necessity requires the construction of it, the *Commission* shall forthwith grant and issue to the applicant a certificate that public convenience and necessity require the construction of

said road as proposed, and shall approve the maps showing the proposed route of said railroad and file the same in their office, and the applicant shall cause a copy of such maps, certified by the secretary of the *Commission,* with the seal affixed, to be filed in the office of the register of deeds in each county in which such railroad shall be located, and such filing shall be a condition precedent to the right of the applicant to institute and maintain condemnation proceedings for the acquirement of land for right of way, stations, and other necessary uses. Sec. 1797—58 provides for a change or alteration of the route by a vote of two thirds of the directors of said railroad, and sec. 2, ch. 454 (p. 1086), Laws of 1907, provides for the repeal of all acts in so far as they are inconsistent with said chapter.

It is clear, therefore, from the foregoing statutes that subd. 6, sec. 1828, Stats. (1898), is still in force, except in so far as it is repealed by ch. 454, Laws of 1907. Prior to the Laws of 1907 a railroad company had the right, by a vote of its board of directors, to locate the line of its railroad. *In re Milwaukee S. R. Co.* 124 Wis. 490, 102 N. W. 401; *In re Eastern Wis. R. & L. Co.* 127 Wis. 641, 107 N. W. 496. Subd. 6, sec. 1828, Stats. (1898), as it existed before the passage of ch. 454, Laws of 1907, provided that in case of crossing of one railroad by another, where the corporations could not agree upon the amount of compensation "or the points and manner of such crossings and connections," the same should be ascertained by commissioners to be appointed by the court. Ch. 454, Laws of 1907, we think obviously was intended by the legislature to authorize the *Railroad Commission* to settle the question of crossing which by the former law was to be settled by commissioners appointed by the court, and therefore the right of the *Railroad Commission* to determine whether such crossing should be above, below, or at grade of the tracks proposed to be crossed, in view of the different statutes above referred to, vested the

Railroad Commission with power to determine the point of crossing as well as whether it should be above, below, or at grade. The provisions of the statutes requiring maps and profiles to be filed with the *Railroad Commission,* describing particularly the location of the proposed road, and the provisions with reference to the approval of such maps and profiles and filing the same, seem clearly to indicate the legislative intention that the action of the *Railroad Commission* was to be based upon the particular line indicated in the papers filed with it for its action, except in so far as errors might be corrected and changes made as provided under the law heretofore referred to. We think, therefore, it logically follows, reading all the provisions of the statute together, that the *Railroad Commission* is authorized to determine the point of crossing as well as the manner, and in passing upon the application the point of crossing is included in the determination of the manner. In many cases at least the point of crossing would have a bearing upon the manner of crossing, whether above, below, or at grade. Besides, the *Commission* under the law is authorized to pass upon the application presented and described in the maps and profiles and not upon some other or different route. We do not see how the legislature could have intended to vest in the *Railroad Commission* the authority to pass upon the manner of crossing and withhold the power to determine the point of crossing, since each is in a degree involved in the determination of the other.

The argument is that commissioners should be first appointed by the court to determine the point of crossing and the damages. But this would seem to be an awkward and impractical execution of the statute; for, until the manner of crossing was determined, it is difficult to see how the commissioners could intelligently assess the damages. Nor could they as well determine the point of crossing until the manner was determined. In fact, it seems the most reasonable and practical construction of the statute would require

that the determination of both point and manner of crossing should rest with the same tribunal, and we think such was the intention of the legislature. That the law as it existed before the passage of ch. 454, Laws of 1907, respecting the right of the railroad company to designate its route, was not abrogated by the latter law, was ruled by this court in a late case. *Eastern R. Co. v. McCord,* 136 Wis. 249, 116 N. W. 841.

It is manifest that the line of road designated in the map and profiles was intended by the legislature to be the line upon which the *Railroad Commission* was to act in determining whether the crossing should be at grade or otherwise and provision was therefore made for the correction of errors, omissions, or defects in the application, maps, and profiles, and that certified copies of the maps be filed in each county through which the road was to run, doubtless for the purpose of making a record of the land sought to be acquired for the road. The provisions of sec. 1797—58 also bear evidence of legislative intention to give the *Railroad Commission* power over the determination of point of crossing. It provides for change of route by filing a map with the *Railroad Commission* and register of deeds where the original map fixing the location is filed, and further states

"Provided that such alteration or change shall not deviate from the original route of such railroad as approved by the *Railroad Commission* for a greater distance than one mile."

Our attention is called to *Olean S. R. Co. v. Pa. R. Co.* 73 App. Div. 412, 78 N. Y. Supp. 113, as controlling on this point. But the New York statute under which this decision was rendered is quite different from ours, and therefore the decision does not shed much light upon the construction of our statute. A careful examination of all the provisions of our statutes upon the subject convinces us that the *Railroad Commission* is vested with power to determine the point as well as the manner of crossing, and that the question of

compensation only under the law is left to the commissioners appointed by the court. 3 Elliott, Railroads, §§ 1119, 1120; *People ex rel. Depew & S. W. R. Co. v. Board of R. R. Comm'rs,* 4 App. Div. 259, 38 N. Y. Supp. 528.

2. The crucial question in the case is the distribution of burdens between the contending companies, namely, what portion of the expense occasioned by the crossing must be borne by the junior company, or company seeking to cross the old road. The right to cross before as well as after the passage of ch. 454, Laws of 1907, is unquestioned; likewise the right of the senior road to some compensation. But the court below as well as the *Railroad Commission* held that the expense of maintaining the crossing and the cost of construction and maintaining the interlocking, derailing, and signal system should be borne one half by each road. This conclusion is based upon the right of the state to alter or repeal the charter of the senior company and also under the police power. The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted. *Comm. v. Essex Co.* 13 Gray, 239; *Sinking-Fund Cases,* 99 U. S. 700; *Shields v. Ohio,* 95 U. S. 319; *Miller v. State,* 15 Wall. 478; *Holyoke Co. v. Lyman,* 15 Wall. 500; *Pearsall v. G. N. R. Co.* 161 U. S. 646, 16 Sup. Ct. 705. The doctrine is well stated in *Sinking-Fund Cases,* 99 U. S. 700, 720, as follows:

"That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. . . ."

The reserve power stops short of the power to divest vested property rights, and is embodied in the state constitution for the purpose of enabling the state to retain control over cor-

porations, and must be construed in connection with th other provision of the constitution to the effect that privat property shall not be taken for public use without compensa tion. It follows, therefore, "that where, under power in charter, rights have been acquired and become vested, n amendment or alteration of the charter can take away th property or rights which have become vested under a legiti mate exercise of the powers granted." *Comm. v. Essex Co. supra.* Moreover, the power to alter or amend is a reserve power in the interest of the state to modify or repeal its ow contract with the corporations. *Tomlinson v. Jessup,* 8 U. S. 454; *State v. C. & N. W. R. Co.* 128 Wis. 449, 10 N. W. 594.

The appellant acquired its right of way and constructe its road under the provisions of the laws of this state, an while subd. 6, sec. 1828, Stats. (1898), was in force and un modified, which subdivision provided:

"But no corporation which shall have obtained the righ of way and constructed its road at the point of intersectio before the application for the appointment of commission ers may be made shall be required to alter the grade o change the location of its road, or be required to bear an part of the expense of making and maintaining such cross ing or of such proceeding."

So under this statute in force at the time appellant con structed its road there can be no doubt that railroads there after crossing were required to pay all the expense of con structing and maintaining such crossing. This statute i in harmony with the common law, as an examination o the authorities will demonstrate. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118; *State ex rel. Minneapolis v. St. P., M. & M. R. Co.* 98 Minn. 380, 10 N. W. 261; *Northern C. R. Co. v. Mayor, etc.* 46 Md. 425; *Dyer Co. v. Railroad Co.* 87 Tenn. 712, 11 S. W. 943; *Perley v. Chandler,* 6 Mass. 454; *Richardson v. Bigelow,* 1

Gray, 154; *State ex rel. North C. R. Co. v. N. P. R. Co.* 49 Wash. 78, 94 Pac. 907.

In *Boston & A. R. Co. v. Cambridge,* 159 Mass. 283, 287, 34 N. E. 382, the court said:

"But at common law the crossing of a new way with one already in use must be made with the least possible injury to the old way, and whatever structures are necessary must be erected and maintained at the expense of the party making the new way, and, if the old way cannot be crossed without damage, the damage must be ascertained and paid."

The appellant, therefore, having acquired its right of way under the statute referred to protecting it from all damages occasioned by the crossing by the junior road, must have a vested property right which cannot be taken for the benefit of another railway without compensation. Although the property of a railroad is devoted to public use it is nevertheless entitled to protection, subject to reasonable regulation in the interest of the public. *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 382; *Interstate Comm. Comm'n v. C. G. W. R. Co.* 209 U. S. 108, 28 Sup. Ct. 493.

In *Eastern Wis. R. & L. Co. v. Hackett, supra,* this court said:

"It is a somewhat prevalent error that property devoted to public use and subject to public regulation is thereby quite out of law, or, as Blackstone says, *caput lupinum.* The use of such property is subject to regulation, and subject to interference by the public authorities with the dominion of the owner to a far greater degree than private property, because of its *quasi*-public character, and because of the tendency to abuse or extortion in its use and management. But, subject to this limitation, the owner of such property has the same rights in his property as any other owner. He may insist upon his own price therefor, except as against the power of eminent domain. He may insist upon all the advantages of location and all the advantages of existing contracts, so long as he does not run counter to reasonable and lawful regulations concerning the use of such property."

And in *W. U. Tel. Co. v. Pa. R. Co.* 195 U. S. 540, 25 Sup. Ct. 133, it is said:

"A railroad's right of way has, therefore, the substantiality of the fee, and it is private property even to the public in all else but an interest and benefit in its uses. It cannot be invaded without guilt of trespass. It cannot be appropriated in whole or part except upon the payment of compensation. In other words, it is entitled to the protection of the constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power is, we said in *Sweet v. Rechel* [159 U. S. 380], that the statute conferring it make provision for reasonable compensation to the owner of the property taken."

Upon the proposition that under the reserve power in the constitution vested property rights cannot be taken away or destroyed without compensation, the following cases are in point: *Detroit v. D. & H. P. R. Co.* 43 Mich. 140, 5 N. W. 275; *Hill v. Glasgow R. Co.* 41 Fed. 610; *San Joaquin & K. R. C. & I. Co. v. Stanislaus Co.* 113 Fed. 930; *Shields v. Ohio,* 95 U. S. 319; *State v. C. & N. W. R. Co.* 128 Wis. 449, 108 N. W. 594.

It seems clear, therefore, under the authorities, that the appellant when it constructed its road prior to the passage of ch. 454, Laws of 1907, acquired a vested property right which cannot be divested without compensation under the reserve power to alter or amend its charter. That the expense of constructing and maintaining the crossing, including the interlocking and derailing system, will be great is without dispute. It is equally clear that this expense is occasioned through the crossing by the junior road, and to compel the senior road to pay any part of such expense is manifestly a taking of the property of the appellant. While it may be conceded that the safety devices are necessary and properly within the power of the *Commission* to order, it is also true that the necessity of such devices was caused by the crossing

by the junior road. The question, therefore, is one of distribution of burdens between the senior and junior roads. That there is no authority of law to lay any portion of this burden upon the senior road under the power to alter or amend its charter (sec. 1, art. XI, Const.) we think is clear.

The question arises whether any portion of the burden can be imposed upon the senior company under the police power. The main contention of counsel for respondent to support the order of the *Railroad Commission* in apportioning a part of the expense of the crossing to the appellant is based upon the police power, and that the act of the legislature (ch. 454, Laws of 1907) is a legitimate exercise of such power. The particular scope of the police power has been the subject of much judicial discussion. In the late case of *State v. Redmon,* 134 Wis. 89, 114 N. W. 137, it is said that in the multitude of attempts which have been made to define it not much has been added to the simple expression that it is the power to make all laws which in contemplation of the constitution promote the public welfare, and the controlling question in considering the scope of the police power is whether the manner of dealing with the subject in the particular case "so passes the boundaries of reason as to overstep some constitutional inhibition, express or implied." The question of the scope of police power has been discussed in numerous decisions of this court, and further general discussion would seem useless.

If the act in question (ch. 454, Laws of 1907) were construed as contended by counsel for respondent, namely, that the *Commission* has power to apportion the cost of the crossing between the roads as it did and without remedy for appellant's damages, it would be unconstitutional and not a reasonable exercise of the police power, because such a construction would amount to a taking of the property of appellant and transferring it to respondent without compensation. We do not think the act should have such construction, and we

believe it is capable of one which will render it constitutional. That the *Commission* had the right to order the interlocking, derailing, and signal system may be conceded, since, in view of the conditions created by the crossing, some such regulation was doubtless necessary. But it was necessary because of the crossing by the junior road, and without such crossing would be unnecessary. The *Railroad Commission* and the court below seem to have been of the opinion that under the law the *Commission* was bound to apportion the costs of crossing between the two roads, and that the statute is mandatory upon the subject. True, the law provides that the *Commission* "shall also fix the proportion of the expense of originally constructing, operating and maintaining such crossing, and of any protective appliances prescribed by them and the proportion of the expense of operating and maintaining the same which shall be paid by the owners of said tracks respectively." The act must have such construction as will save it from infringing the constitution, if it will bear such construction. Now, while the language of the act may support the construction claimed for it by respondent, we think it capable of a construction which would not require the *Railroad Commission* to impose any part of the expense of the crossing upon the senior road which would result in a taking of its property without compensation; as, for example, all damages occasioned by the crossing might be adjusted in the condemnation proceedings, and thus the equal status of the roads as to future burdens established, and perhaps other conditions might arise in cases where a part of the expense of the crossing might be charged to the senior road without violating any constitutional principle. We shall not attempt to anticipate what cases or conditions might arise which would justify charging part of the expense to the senior road. It is sufficient to say that such construction cannot be given the law as would result in taking the property of appellant for the benefit of respondent

without compensation. But, returning to the question of right to impose the burden of one half of the expense of the crossing under the police power upon the senior road, and conceding that it was within the power of the *Commission* to order such system, the order cannot be sustained except on the idea of payment of damages to the senior road.

Counsel for respondents seek to support their position on the authority of cases regarding public street crossings. But the distinction between the two classes of cases is quite clearly marked. In the first place, the "ways," as pointed out in the decisions of some courts, are not of the same general nature. Among other points of distinction which may be suggested it may be observed that a street or public highway is opened and used, not for revenue, but solely for the benefit of the general public. While it is true a railroad has some of the attributes of a public highway, in that it is a common carrier of freight and passengers, yet it is owned by private parties and operated and used as other private property for gain, subject to public control, because devoted to a public purpose. And so the common-law rule respecting the distribution of the burden caused by the crossing of "ways" has been held to apply to "ways" of the same general nature. *State ex rel. Minneapolis v. St. P., M. & M. R. Co.* 98 Minn. 380, 108 N. W. 261; *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 418, 72 N. W. 1118. And in *Toledo, A. A. & N. M. R. Co. v. D., L. & N. R. Co.* 62 Mich. 564, at p. 566 (29 N. W. 503), speaking on a statute similar to ours, the court said:

"But I can find no authority for compelling the company whose road is crossed to pay any part of the expense of making or constructing the crossing. Certainly, it is not for its interest to have its property thus used; and while the company in accepting its franchise must be regarded as having done so upon the condition that its road might be thus crossed upon being paid reasonable compensation therefor, there can be no presumption that it ever consented to pay for the privi-

lege of being thus injured. I know of no law or principle which will compel one company to build and maintain a railroad track for another or to furnish the money necessary for that purpose; and to the extent that this section of the statute requires this to be done in this class of cases it is repugnant to the constitution."

In *Flint & P. M. R. Co. v. D. & B. C. R. Co.* 64 Mich. 350, 31 N. W. 281, it was held that in condemnation proceedings by one railroad for the right to cross another, the cost of maintaining signals, a crossing system, and watchman were proper elements of damages. In *State ex rel. North C. R. Co. v. N. P. R. Co.* 49 Wash. 78, 94 Pac. 907, the court held that the burden of maintaining an interlocking device at the point of crossing was an actual damage to the senior road and that such was the result of the crossing, and therefore it should be charged to the road for whose benefit the damage was occasioned. In *Butte, A. & P. R. Co. v. M. U. R. Co.* 16 Mont. 504, 41 Pac. 232, it was held that the expense of a watchman at the crossing should be imposed upon the new road. In *West Jersey & S. R. Co. v. Atlantic City & S. T. Co.* 65 N. J. Eq. 613, 622, 56 Atl. 890, 894, the court said:

"There seems to be no equitable ground which requires the senior company presently in occupation to pay anything to enable the junior company to construct its own crossing in such a manner that it shall not impair rights of the senior company already vested and in enjoyment. It is the duty of the junior company so to build its tracks over the senior company's rails that the crossing may be safe."

To the same effect are the following cases: *Winona & S. W. R. Co. v. C., M. & St. P. R. Co.* 50 Minn. 300, 52 N. W. 657; *Elkins E. R. Co. v. W. M. R. Co.* 163 Fed. 724; *St. Louis, J. & C. R. Co. v. S. & N. W. R. Co.* 96 Ill. 274; *Chicago & W. I. R. Co. v. E. C. R. Co.* 115 Ill. 375, 4 N. E. 246.

It would be useless to attempt a general review of all the

authorities. We shall refer, however, to some of the cases mainly relied upon by the respondents; and in considering the authorities it must be borne in mind, as before stated, that the question here is not as to when and under what circumstances the state can, under the reserve power, alter or amend its contract with the corporation or take property under a reasonable exercise of the police power in the interest of the public, but whether it can take the property of one lawfully acquired under legislative authority and give it to another without compensation to the owner. In *Chicago, St. P., M. & O. R. Co. v. C., M. & St. P. R. Co.* 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180, the question arose under a contract as to the meaning of "other similar appliances," and it was held that they did not include an interlocking system, since such system could not have been in the contemplation of the parties when the contract was made. The question arose under a contract between the two companies, parties to the contract, while here the *Commission* determined what shall constitute a proper crossing. In *Railroad Commission Cases,* 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, the question was as to the right of the state to regulate rates and fix a minimum transportation charge. In *Pennsylvania R. Co. v. Miller,* 132 U. S. 75, 10 Sup. Ct. 34, the question arose as to the right, under a change in the constitution of the state, to recover consequential damages in a condemnation proceeding, and the court held that, since there was no exemption from future liability for such damages, it took its charter subject to such liability created by general law in respect to the subject matter involved. In *Chapin v. Crusen,* 31 Wis. 209, the case grew out of a ferry franchise which was held to be a mere license, and even in that case the court recognized the doctrine that vested property rights could not be destroyed. *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, is where the question arose on stipulation entered into between the roads. *Cincinnati, I. & W. R. Co. v. Con-*

nersville, 170 Ind. 316, 83 N. E. 503, involved the questio of right to damages occasioned through compliance with po lice regulation. *Grand Trunk W. R. Co. v. Railroad Com mission,* 40 Ind. App. 168, 81 N. E. 524, involved contrac rights between the roads respecting an interlocking system *Northern P. R. Co. v. State ex rel. Duluth,* 208 U. S. 583 28 Sup. Ct. 341, holds that the police power of the state can not be contracted away.

Many other cases cited by respondents involve the exercis of the police power, and where no question of vested prop erty rights between the roads existed, and crossings of street or public highways. The case most in point cited by re spondents is *Lake Shore & M. S. R. Co. v. C., S. & C. R. Co* 30 Ohio St. 604. This case appears in a degree to suppor the respondents' contention, although it recognizes the righ of the senior road to have compensation for its property The case does not seem to rest on a statute like ours (subd 6, sec. 1828, Stats. 1898), and if any such statute existed i Ohio at the time the road was built, which we fail to find, i was not considered by the court as controlling in any way i the case. We have seen from the authorities cited that th crossing road at common law was bound to restore the senio road as far as possible to its former serviceableness and pa all damages occasioned by the crossing, and our statute re ferred to manifestly was passed to protect that property righ and remove any question on the subject.

3. It is further contended by counsel for appellant tha ch. 454, Laws of 1907, is invalid, since it purports to inves the *Railroad Commission* with power to fix the proportion o the expense of crossing, and is therefore a delegation of legis lative power or a vesting of the *Commission* with judicia power. We do not regard this position tenable. *Minneapo lis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 13 Wis. 146, 116 N. W. 905; *Madison v. Madison G. & E. Co* 129 Wis. 249, 108 N. W. 65; *State ex rel. Kellogg v. Cur rens,* 111 Wis. 431, 87 N. W. 561; *Nash v. Fries,* 129 Wis

120, 108 N. W. 210; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *Union B. Co. v. U. S.* 204 U. S. 364, 27 Sup. Ct. 367.

4. It is settled that unless the order of the *Railroad Commission* be unlawful or unreasonable it cannot be disturbed. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905. The *Commission,* as appears from its opinion printed in the record by the respondents, indicates that it considered under "the plain mandate of the statute" that it was compelled to distribute the burden as it did, and that it was not concerned with the elements of damage to which the appellant was entitled under subd. 6, sec. 1828. The court below seems to have taken the same view, as appears from the memorandum opinion filed, in which it is said that if the appellant has the right to recover such expenses that is a matter to be considered by the condemnation commission. It is quite obvious, therefore, that both the *Railroad Commission* and the court below were in doubt as to what damages should be recovered in the condemnation proceedings, and intended to leave that matter for future determination. If the purpose of the *Railroad Commission* in making the order, and the court in affirming it, was to negative the right of the appellant to recover the damages caused by the crossing, including maintenance of the crossing and construction and maintenance of the interlocking, derailing, and signal system, the *Commission* and court were wrong and acted without authority in that regard. But, on the other hand, if the purpose was to apportion the expense to be charged to each road in the future, leaving the amount of damages occasioned by the crossing to be awarded by the commissioners appointed by the court in the condemnation proceedings, then the order of the *Commission* is within the law. This seems to have been the theory of the *Commission* and the court below, and we think is the most practical and workable construction of the statute.

It follows from what has been said that upon the case made

the appellant should recover in the condemnation proceedings all damages caused by the crossing of the senior road by the junior road, including cost of grading, rails, frogs, switches, and other appliances used in constructing and maintaining the crossing, as well as the cost of constructing and maintaining the interlocking, derailing, and signal system. The judgment should therefore be modified so as to make clear this idea.

By the Court.—The judgment of the court below is modified so as to affirm the order of the *Railroad Commission* without prejudice to the appellant's right to recover all damages as indicated in this opinion, and as so modified is affirmed. No costs are allowed either party upon this appeal, except that respondents pay the clerk's fees.

The following opinion was filed June 4, 1909:

Barnes, J. (*dissenting*). The senior line of road is not benefited theoretically or practically by having its tracks crossed by those of the line subsequently built. The public is not interested in requiring the senior line to pay any part of the expense of such crossing, and so much of sec. 1797—56, Stats. (Laws of 1907, ch. 454), as empowers the *Railroad Commission* to require the senior line to defray any portion of the expense of constructing a crossing proper is void because it deprives the company of its property without due process of law, in violation of the XIVth amendment to the federal constitution. This particular provision of the law may well be held void without jeopardizing the remaining portion of the act.

No part of the expense of constructing the crossing proper was assessed against the senior lines in this case, although they were required by the *Commission* to defray one half the expense of maintenance. In the absence of any showing that such expense was a material item, or that the amount

the senior lines would be called upon to pay would exceed the cost of maintaining their respective roads at the point of intersection had no crossing been made, the order of the *Commission* was not erroneous.

The court treats the crossing and the interlocking device as being one and the same thing. It seems to me that this conclusion is fundamentally wrong. It is true the crossing creates the necessity for the interlocking plant, if necessity there is, but it is also true that it is perfectly feasible to operate railroads without it. There were numerous grade crossings before such devices were invented, and there are still numerous crossings at grade where no such device is used. An interlocking plant is primarily a safety device, calculated to protect the lives and limbs of passengers and train employees. Secondarily, it is a device calculated to facilitate traffic and commerce. It is not a crossing. The junior road has the right under the statute to cross the senior line. Such right existed when the roads of the appellant companies were built. When that right is exercised, it is as important that the employees and the patrons of one line be protected as it is that those of the other should be; and it is likewise as essential that commerce be not impeded on the one line as it is on the other.

The state has the undoubted right in the exercise of its police power to require railway companies to install safety devices such as interlocking plants, whenever in the exercise of any reasonable judgment the public safety or convenience requires such installation. This is true as to roads that were constructed a half century ago, and it is true of roads that are constructed at the present time. It is conceded in the opinion of the court that this right exists, but only in a restricted way. The court holds that such power of regulation can be exercised only when the junior road is required to defray the entire expense of the safety appliance used for the protection of persons on both roads. Herein it seems to

me that the court has departed from sound legal principl well-nigh universally recognized, and has confounded t power of the state in the exercise of eminent domain wi its exercise of police power. Our constitution prevents t taking of private property for public use without just co pensation. Compensation has never been required or co sidered as a necessary element in the exercise of police powe If the necessity exists for the exercise of the power it ma always be exercised, regardless of whether private proper is taken or not. So the question here is, not what the e pense of the interlocking plant will be, or who shall bear t burden of its instalment, but, Does the public safety or t public convenience require that it be installed? If this fa exists, the power of the state is plenary to order the install tion and to make such provision in regard to the division expense as it deems just. In the exercise of this power may order the removal of expensive industrial plants tha were not originally but have become nuisances by reason the growth of the cities in which they are located. It ma tear down dangerous structures, may destroy liquor unla fully kept for sale, may establish quarantine regulation may destroy animals afflicted with a contagious disease, ma raze buildings to prevent the spread of conflagrations, an may do many other things too numerous to mention, and a these things may be done without an iota of compensatio to the persons damaged. If it be conceded, as it seems to b that the police power may be invoked to require safety d vices to be installed, there is little support in the authoritie for the position that the state may not apportion the expens between the carriers affected. Freund, Police Power, § 51 *et seq.* I see no reason why the state may not require safet devices such as interlocking plants to safeguard crossings, re gardless of whether such crossings are made before or afte the passage of the law requiring the devices to be used. Th power to require the device necessarily carries with it th

power to determine who shall bear the burden. There is, in my opinion, no more reason for requiring the junior road to bear the entire burden of such a device where the crossing was made in 1908 than there would be in requiring such a road to bear the entire expense of an interlocking plant in connection with a crossing made forty years ago. As population and traffic increases, the use of such devices will become more general, and it is apparent that such devices will be installed at crossings where for a long series of years none have been maintained. Under the very act we are considering, the *Commission* might have found that no necessity existed for the constructing of an interlocking plant. It is, however, expressly authorized at any time in the future to order such a plant to be constructed if the public good so requires. If such construction were ordered after the right of way had been condemned, then certainly the senior road could not be reimbursed for its part of the outlay in any condemnation proceeding.

No very clear legislative declaration is made in the law of 1907 requiring railway companies to adopt and install approved safety devices whenever necessary to protect life or to facilitate commerce, although such declaration may be fairly implied from the language used. In the absence of such provision, express or implied, in the law, it would be difficult to say that it did not confer legislative power upon the *Commission* under the rule of *State ex rel. Adams v. Burdge,* 95 Wis. 390, 70 N. W. 347; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 65 N. W. 738; *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033, and kindred cases. It being the policy of the legislature to require such appliances to be installed whenever reasonably necessary, the legislature may constitutionally delegate to the *Commission* the power to determine the fact as to whether or not the necessity exists for an interlocking device at a given point. When such determination is made, it becomes incumbent on the railroads af-

fected to install the device. It is competent for the legisl ture to make any reasonable apportionment of the expens of such device, and it may delegate to the *Commission* th right to make such apportionment. I do not think there any inequity in requiring the junior and senior railroads a fected to contribute equally to the expense of constructin and maintaining a safety device where the benefits to be d rived are substantially equal. In any event, the legislatu has the right to make the apportionment, and its apportio ment is final unless it palpably violates some constitution provision in so doing. The division of expense made in th case by the *Commission* stands on the same footing as if mad by the legislature.

Sec. 1797—56, Stats. (Laws of 1907, ch. 454), clearl empowers the *Commission* to determine and apportion th cost of the protective appliance and of the expense of opera ing and maintaining the same between the senior and junio lines, and further provides that the expenses so apportione shall be paid by the companies to which they are apportioned

I do not think it was the intention of the legislature t permit the senior line to recover back from the junior lin in condemnation proceedings or otherwise, the amount r quired to be paid by the senior line under sec. 1797—5 There is no language in the act from which such a right ca be implied. The plain ordinary meaning of the statute i that what is paid by the senior line is paid for a device tha will inure to its benefit as well as to the benefit of the junio road, for the recovery of which no right exists. It seems t me to be an unjustifiable construction of the statute to hol that it means otherwise. It is a purely senseless proceedin to require the senior road to contribute to the constructio in the first instance and then require a like amount of mone to be refunded to it. The legislature should be acquitted o intending anything so childish. Indeed, the court holds tha it adopts its construction of the law, not because it is th

reasonable one, but because it is necessary to do so to avoid declaring it unconstitutional.

The construction adopted by the court is impracticable and cannot be carried out. A money award only can be made in condemnation proceedings. It is impossible to make such an award to cover maintenance expenses. No one can determine when the earth will cease to exist, or is wise enough to say that these roads will not be operated for all time.

Sec. 1797—56 directly negatives the construction placed thereon by the court. Condemnation proceedings are usually instituted and carried on before the new road is actually constructed, and must be so carried on if the landowner so elects. The *Commission* may not in the first instance require safety appliances to be installed at all. If the exigencies of business later require installation, the *Commission* may at any time order the appliances to be put in. If, in this case, no interlocking plant had been ordered by the *Commission,* could the expense of such a plant be charged to the junior road in condemnation proceedings based upon the contingency that such a plant might be ordered at some time in the future? I think not, and that, if installation were ordered five or ten years hence, there would be no doubt under the law that both roads might be required to share in the expense.

It is said in the opinion of the court:

"The right to alter or repeal existing charters is not without limitation when the question of vested property rights under the charter is involved. The power is one of regulation and control, and does not authorize interference with property rights vested under the power granted."

I desire to expressly record my dissent from the quoted part of the opinion. Sec. 1, art. XI, of our constitution empowers the legislature to enact laws for the formation of all corporations without banking privileges. It expressly provides that "all general laws or special acts, enacted under the

provisions of this section, may be altered or repealed by th legislature at any time after their passage." There is n limitation on the right of the legislature to repeal corporat charters except the consciences of the legislators, and n limitation on the right of amendment except the XIVt amendment to the federal constitution. The state may nc confiscate the property of corporations to itself, but the in cidental loss that may result from the repeal of a corporat charter is one that every corporation knowingly faces an assents to when it elects to incorporate under the laws of th state. This provision of our constitution was advisedly in serted to obviate the effect of the decision of the suprem court of the United States in the *Dartmouth College Case*, Wheat. 518. It is too plain to admit of more than one mean ing or interpretation and too important to be frittered awa by inadmissible construction.

I think the order of the circuit court should be affirmed and that the appellants are not entitled to recover in con demnation proceedings any part of the expense of installin the interlocking plant.

WINSLOW, C. J., concurs in the foregoing dissentin opinion.

The following opinion was filed June 9, 1909:

MARSHALL, J. (*concurring*). It escaped my attention til after the court's opinion was filed that it is there suggested that the question of whether proceedings to obtain the cer tificate of public necessity and convenience were premature was involved on this appeal. That is hardly accurate. Such proceedings were necessarily commenced and concluded un der sec. 1797—48, Stats. (Laws of 1907, ch. 454), and pre ceding sections before this proceeding was instituted. The former related to general right to construct the road. The latter to manner of constructing it, including crossings of

r roads and the construction, maintenance, and operation ecessary safety devices at such crossings, and necessarily ired, as hereafter indicated, preliminary thereto the lo- g of such crossings. The right to cross other railroad s is referable to subd. 6, sec. 1828, Stats. (1898). The ority, in case of disagreement, to fix the place of any crossing is also referable to such subdivision, unless it perseded by the act of 1907, which appellant denied. ocation of the crossing in question had been made under old law, therefore appellant contended this proceeding, wing in logical order the preliminary one to obtain the al certificate, was prematurely commenced.

he act of 1907 did not expressly supersede the old law gards authority to locate crossings. It did, as indicated e decision, confer such power as to things made the sub- matter of this proceeding, as, by necessary implication, rry therewith power to locate the place of crossing any r road, thus repealing the old law on the subject. So it held, this proceeding was not prematurely brought be- e power to locate the place of crossing of another road cidental to the power sought specially to be exercised. y oversight, I think, the declaration appears in the opin- hat the reserve power in the constitution to alter, amend, repeal corporate charters is "one of regulation and con- ' The court did not intend to go further than *Sinking- d Cases,* 99 U. S. 700, cited to the effect that such power not extend to authority to take away property acquired r a corporate charter.

he trial court is acquitted in the decision, I understand, aving determined that, in the ultimate, the senior road bear any of the burden of the crossing or its accessories, r of construction, maintenance, or operation. It is held the order and judgment merely create a status to be dealt in condemnation proceedings, and that so far as it and onsequences would otherwise be, by appropriation of its

property, to the permanent pecuniary injury of appellant a compared with the situation without the new crossing, th commissioners in such proceedings should award a mone equivalent, and that a construction of the act of 1907 to tha end is reasonable and necessary to save it from condemna tion as unconstitutional.

The decision of the court recognizes that the judgmen complained of, following the determination of the *Railroa Commission,* in creating a status to be dealt with in condem nation proceedings, imposed upon the junior road the burde of making the crossing, furnishing all labor, material, an appliances to that end. The decision, now, as I understan it, merely provides for the ultimate imposition upon suc road, by its paying to the appellant a money equivalent fo the burden left upon it otherwise, by the status created b the judgment. The purpose of the concluding words of th opinion was, as I understand it, to cover the idea that appel lant should recover in the condemnation proceedings on tha basis; that is for all damages caused to it by a change of it property status to its pecuniary loss by appropriation of suc property to the use of respondents, including the cost to it the appellant, of grading, rails, frogs, switches, etc., in viev of what is required of the junior road by the judgment, whic requirement is left undisturbed except as indicated. Th concluding paragraph of the opinion should not be read a requiring the commissioners, in the condemnation proceed ings, to award appellant compensation for the very thing the judgment requires respondents to furnish in place. Tha appears plainly by reading such concluding paragraph in th light of what precedes it.

I do not understand the court's determination goes fur ther than the precise situation dealt with, *i. e.* the awardin of damages to be made by commissioners in the condemna tion proceedings in case of a status created as in this case It has nothing to do with distribution of burdens in case o

ulsory installation of a safety device at an existing ing.

already indicated, it is a mistake to suppose the con- tion of the act of 1907 by this court is not adopted be- e reasonable, but because it is necessary to save the law. the court's duty to adopt such reasonable construction law as is necessary to avoid condemning it as unconsti- nal, and the one adopted here was taken as both so neces- and reasonable and in accord with the legislative idea. gain it would be a mistake to suppose there is any ques- under the decision as to competency of the state, by vir- of its police power, to compel the installation of safety es at an existing railway crossing upon reasonable con- ns, including an equal distribution of the burden caused by as one of such conditions. But a firm maintenance at salutary principle does not necessitate holding that ould be reasonable to thus burden two roads equally in circumstances of this case.

may, at first blush, appear difficult in condemnation eedings to fix a money equivalent for one half of the bur- of the indefinite maintenance and operation of a cross- and its safety devices, but it seems the idea that it is ght with insurmountable difficulties is more imaginary real. It may well be said that much more difficult lems than that are often met with in condemnation and r judicial proceedings. Upon proper evidence and com- nt data, not difficult to present, human judgment can y encompass such a situation.

should not be supposed that every legislative regula- which to any extent is in the field of police power, may uestionably be made regardless of its effect upon private ts as regards taking property for public purposes with- rendering compensation therefor. There is no govern- tal function, which, rightly understood and adminis- d, is more beneficial to life, liberty, and the pursuit of

happiness than the police power, but which, not rightly understood and administered within its constitutional limitations, is more liable to be destructive of the very rights governments are instituted to conserve. It is only in recent years that it has come to be fully appreciated that such power is not without constitutional limitations; that every exercise of it, to be constitutional, must answer for legitimacy at the bar of reason enthroned in the very spirit of the fundamental law.

True, the police power is one of necessity. Anything which may properly be done, referable thereto alone, so far as it affects property rights may be done without rendering compensation. But if every regulation, justifiable to any extent by the police power, could be made without reference to the power of eminent domain or any other, private rights would be exceedingly insecure. The power of eminent domain and the police power are radically different. The latter relates to regulation, yet its exercise may, in many instances, result in a practical taking of private property for public purposes. The former relates, in the broad view, to any appropriation of private property for such purposes other than by the supreme necessities of war or the power of taxation, which is not within the field of legitimate mere police regulation. Though exercise of the police power is grounded on necessity and the public welfare, so is that of either of the others. The aggregate of private wealth of the nation, in the broad view, is the property of the nation for public purposes, in that, in the various ways suggested, under constitutional safeguards, it is subject to be laid hold of under the powers inherent in sovereignty for such purposes, sometimes by one power alone and sometimes by another, and sometimes by one as the primary force with another as auxiliary thereto, according to the appropriateness of the instrumentality or instrumentalities to fit the particular situation to be dealt with. Where the purpose is legiti-

te and the means are legitimate, in that they do not un-
y regulate so as to unreasonably work a deprivation of
vate property rights in case the burden is cast absolutely
on proprietors, the police power alone fits the case. Where
regulation goes beyond that point, some auxiliary power,
the power of eminent domain, is necessary to avoid the
ment of unreasonableness. In that there is no confusion
powers.

Any supposed confusion in such a case as that last indi-
ed is imaginary rather than real. It may spring from
nt of appreciation that one of the sovereign powers re-
red to may be, and often is, necessarily used as auxiliary
another in order to legitimately accomplish a particular
itimate result. If one puts his shoulder to the wheel,
plementing the power at the pole, and by the added ele-
nt motion is produced, there is no confusion of the former
h the latter. There is simply a primary and auxiliary
ce, each distinct from the other, operating to a single end.
ith the absence of either the thing to be accomplished
uld remain undone. These principles I deem to be fun-
mental and so forego authoritative citations to support or
ustrate them. Such is the philosophy of the law in its
entific aspect, as I view it, and removes many of the sup-
ed mysteries of the police power, particularly as to where
ends as regards interfering with private possessions and
power of appropriation requiring a money equivalent be-
ns. The dividing line between the two is sometimes shad-
y. It is less so according as we appreciate the legitimacy
the two powers being wedded, so to speak, when necessary
particular circumstances. The line is primarily for legis-
ive ascertainment within fundamental limitations, and
wisdom should prevail in any case unless manifestly
ong beyond reasonable doubt. But whether it is or is not
ong, in any given circumstances, is a judicial question.
at the constitutional instrumentality to decide primarily

and the one to decide ultimately should each act considerately and fearlessly and with becoming deference to the other, is the concept of our system. Any difference resulting in the performance of duty does not rightly suggest criticism of either.

We may well concede that the public in such a case as this would be benefited by the construction and maintenance of the safety device, but the junior road would be enriched to the full amount it would be required to render the senior road, in that the former could not be constructed without the benefit of the crossing and the latter would be correspondingly impoverished if it were not for the compulsory exchange of equivalents under the power of eminent domain as contemplated in the judgment of the court. If the legislature contemplated the appropriation without such exchange, then the regulation, it is thought, would go beyond the legitimate domain of police power, and so, it is thought, it was not so contemplated and that this negative can reasonably be read out of the enactment in question. The construction given thereto in the court's judgment renders it sensible, reasonable, constitutional, and workable.

The judgment below having left the ultimate location of part of the burden caused by the crossing uncertain, appellant rightly conceived itself to be aggrieved and so the conclusion was reached that it should not be mulct with costs upon the appeal.

The points recognized or decided by the court, as I understand the matter, are these:

1. The right, in the general sense, to construct the road is referable to the certificate of public convenience and necessity under secs. 1797—43 to 1797—53, Stats. (Laws of 1907, ch. 454), inclusive.

2. The right to cross the track of the senior road is referable to subd. 6, sec. 1828, Stats. (1898).

3. The right to take the property of the senior road at the point of crossing is referable to such section.

4. Authority to locate the place of crossing is referable to implied power of the *Railroad Commission* under secs. 97—54 to 1797—56, inclusive, and the general spirit the act of 1907, superseding, by necessary inference, subd. sec. 1828, Stats. (1898), on that subject.

5. The manner of constructing the road, including manof making the crossing with its accessories and the eslishment of status in respect thereto, to be dealt with in demnation proceedings, is referable to the decision of the *ilroad Commission* under secs. 1797—54 to 1797—56.

6. The manner of acquiring the property for the purposes the road, including that of any other road at the crossing, referable to secs. 1845 to 1851, inclusive, and such other ts of ch. 87, Stats. (1898), as bear on the subject, the ceedings to that end to be subsequent to the determina- by the *Railroad Commission* under secs. 1797—54 to 97—56, inclusive.

7. The commissioners in condemnation proceedings are uired to deal with the situation created by the deterination aforesaid making the owner of the senior road ssed good by award of a money equivalent for *such* appriation of its property rights as shall be contemplated view of such determination, including the cost of *such* ding, rails, frogs, switches, and other appliances used in structing and maintaining the crossing, and maintaining operating safety appliances, as shall be preliminarily ened upon it in view of *such* determination.

A motion for a rehearing was denied October 5, 1909.

STATE EX REL. GREAT NORTHERN RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

March 31—October 5, 1909.

State ex rel. Northern Pacific R. Co. v. Railroad Commission, ante, p. 145, followed.

APPEAL from a judgment of the circuit court for Dane county: RAY STEVENS, Circuit Judge. *Modified and affirmed.*

For the appellant there was a brief by *J. A. Murphy*, attorney, and *W. M. Steele*, of counsel, and oral argument by *Louis Hanitch* and *Charles Donnelly*.

For the respondents there was a brief by the *Attorney General* for the *Railroad Commission*, by *Luse, Powell & Luse*, attorneys for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the *Wisconsin & Northern Minnesota Railway Company*, and by *Alfred H. Bright*, of counsel; and the cause was argued orally by *Mr. L. K. Luse* and *Mr. Bright*.

The following opinion was filed June 3, 1909:

KERWIN, J. This case is ruled by *State ex rel. Northern Pac. R. Co. v. Railroad Commission*, *ante*, p. 145, 121 N. W. 919.

By the Court.—The judgment of the court below is modified so as to affirm the order of the *Railroad Commission* without prejudice to the appellant's right to recover all damages as indicated in the opinion in *State ex rel. Northern Pac. R. Co. v. Railroad Commission*, *ante*, p. 145, 121 N. W. 919, and as so modified is affirmed. No costs are allowed either party upon this appeal except that respondents pay the clerk's fees.

WINSLOW, C. J., and BARNES, J., dissent.

A motion for a rehearing was denied October 5, 1909.

STATE EX REL. LAKE SUPERIOR TERMINAL & TRANSFER RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

March 31—October 5, 1909.

State ex rel. Northern Pacific R. Co. v. Railroad Commission, *ante*, p. 145, followed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Modified and affirmed.*

For the appellant there was a brief by *J. A. Murphy*, attorney, and *W. M. Steele*, of counsel for the Great Northern Railway Company, and oral argument by *Louis Hanitch* and *Charles Donnelly*.

For the respondents there was a brief by the *Attorney General* for the *Railroad Commission*, by *Luse, Powell & Luse*, attorneys for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company and the *Wisconsin & Northern Minnesota Railway Company*, and by *Alfred H. Bright*, of counsel; and the cause was argued orally by *Mr. L. K. Luse* and *Mr. Bright*.

following opinion was filed June 3, 1909:

WIN, J. This case is ruled by *State ex rel. Northern Pac. v. Railroad Commission*, *ante*, p. 145, 121 N. W. 919.

the Court.—The judgment of the court below is modified so as rm the order of the *Railroad Commission* without prejudice to ppellant's right to recover all damages as indicated in the n in *State ex rel. Northern Pac. R. Co. v. Railroad Commis-nte*, p. 145, 121 N. W. 919, and as so modified is affirmed. No are allowed either party upon this appeal except that respond-ay the clerk's fees.

SLOW, C. J., and BARNES, J., dissent.

notion for a rehearing was denied October 5, 1909.

, Administratrix, Respondent, vs. UNIFORM STAVE & PACKAGE COMPANY, Appellant.

April 1—October 5, 1909.

r and servant: Death of servant: Unguarded opening in vat: Statutory duty of master: Negligence: Assumption of risk: Contributory negligence: Evidence: Questions for jury: In-tructions: Placing guards after accident: Order of proof: Bur-len of proof: Intoxication of decedent at other times.

an action for death of an employee in defendant's factory who fell into an unguarded opening caused by the raising of a trap door in the top of a tank of hot water, it is *held* upon the evidence to have been a question for the jury whether such opening could have been guarded by barriers or other safe-guards without unreasonably interfering with the work which was being carried on and which could not be performed with the door closed.

nployees do not assume the risks arising from negligent failure of the employer to surround vats containing hot liquids with proper safeguards as required by sec. 1636*j*, Stats. (1898).

an action for death of an employee caused by such negligence, contributory negligence of the deceased other than assumption of the risk may be shown and may constitute a defense.

4. Where in an action for death the question whether decedent was guilty of contributory negligence as a matter of law is under the evidence extremely close, the appellate court must place considerable reliance upon the decision of the trial court.
5. Contributory negligence of the decedent is *held* not to have been conclusively established in this case, there being evidence from which the jury might infer that at the time he fell into an opening in the top of a vat containing hot water the steam arising therefrom was so dense that he became confused or partially lost his way. BARNES and MARSHALL, JJ., dissent.
6. Evidence that after the accident defendant placed guards around the opening was not competent to show negligence in not having it guarded at the time of the accident, but when offered merely to show that it was feasible to place such guards was competent and was properly admitted as part of plaintiff's case in chief.
7. Failure to instruct the jury that such evidence was no proof of defendant's negligence was not error in the absence of a request for such instruction.
8. Contributory negligence is an affirmative defense and the burden of establishing it is upon the defendant whether the evidence to establish it be given by witnesses for plaintiff or for defendant. *Achtenhagen v. Watertown*, 18 Wis. 331, distinguished.
9. In an action for death involving the question of decedent's contributory negligence, evidence that he had been intoxicated on former occasions was inadmissible.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This action was brought to recover damages for the death of plaintiff's intestate and resulted in a verdict and judgment for plaintiff, from which this appeal is taken.

On December 24, 1907, about 10 o'clock in the forenoon, the deceased walked into an open tank of hot water at appellant's plant and met his death in consequence thereof. The tank was thirty-three feet wide and fifty-two feet long, and was divided into three compartments, each ten feet by fifty-two feet, and the water therein was eight feet deep. There was no roof over the tank and it was covered with two-inch plank. In each of the compartments and extending lengthwise thereof there were five trap doors, each seven feet

g and three feet four inches wide. These trap doors re kept closed except when the compartment, of which y furnished a partial covering, was being emptied or ed. Each compartment held a day's supply of bolts for factory. The contents of one was being manufactured ile another was being filled, and in the third bolts were ng boiled preparatory to manufacture. The bolts were ried from the vat into the factory by an endless chain, ich, together with a runway leading thereto, extends about teen feet from the factory proper. As the bolts were be- manufactured the same were pushed onto the endless in; those nearest the chain being first taken. As the cess of emptying the compartment continued, it was neces- y to keep raising the trap doors extending toward the r end of the vat, so as to push the blocks onto the chain. On the morning in question the middle compartment was ng emptied, and the three trap doors therein nearest the less chain were open, and two men were at work in push- the bolts onto the chain. The deceased stepped into the ning farthest from the endless chain and nearest the rear of the vat. He had been working at the plant for six nths. His work consisted principally in rolling the bolts, they were sawed, into the vats, and in taking the trim- ngs and short pieces of waste from the logs as they were into bolts and placing them in a pile at the rear or west of the vat. On the morning of his injury the deceased engaged principally in removing the waste material. compartment nearest the mill was being filled and the s were being carried into this portion of the vat by force gravity. The trap door into which the deceased fell had n open about an hour before the accident. It was neces- y for the deceased in carrying away the refuse to pass the middle compartment and over one of the trap doors ein. The direct line between the point from which he the refuse and the place where he deposited it would

be about four feet from the open trap door. The point where he actually stepped into the vat is not definitely established but the evidence tending to show that it was about seven feet out of the direct line of travel is reasonably satisfactory and is not disputed. The distance the refuse was carried was twenty-five feet. During the hour that the trap door was open, deceased in carrying the refuse passed by the open space in the neighborhood of forty times and within a very few feet of the same. He was making his return trip after having deposited a block in the rear end of the vat when he fell in. He was thoroughly familiar with the manner in which the work was conducted. He and the two men employed to push the bolts onto the endless chain were the only men employed on the top of the vat.

There was evidence tending to show that at times there was considerable steam issuing from the openings, occasioned by the lifting of the trap doors, as well as some steam escaping through the cracks. At times it appeared to be quite dense and would then clear away for a short interval. The evidence leaves the impression that, while there was more or less steam escaping all the time, there were times when the vat was comparatively free from it; while at other times it apparently settled and beclouded the vat.

Appellant urges that the court erred (1) in refusing to grant a nonsuit; (2) in refusing to direct a verdict; (3) in instructing the jury; (4) in ruling on evidence; (5) in refusing to change the answers of the jury to two questions in the special verdict; (6) in refusing a new trial; and (7) in ordering judgment for respondent.

For the appellant there was a brief by *Lamoreux, Shea & Cate,* and oral argument by *C. A. Lamoreux.*

G. N. Risjord, for the respondent.

The following opinion was filed April 20, 1909:

BARNES, J. This appeal involves the following questions: (1) Was the defendant negligent? (2) Was decedent guilty

contributory negligence? (3) Was it error to permit plaintiff to show that the openings in the top of the vat e guarded after the accident? (4) Did the court err in rging the jury that the burden of proof was upon the de- dant to establish the defense of contributory negligence? . The only ground of negligence on the part of the defend- that it is claimed existed was its failure to surround the n spaces, left in the top of the vat by the raising of the doors therein, with suitable barriers or safeguards for protection of its employees, as required by sec. 1636*j*, s. (1898). There can be little doubt that the open un- rded trap door created a situation of danger for em- ees working around the opening, and it was a question the jury to determine on the evidence whether such open- could be guarded without unreasonably interfering with work that was being carried on, and which could not be formed with the doors closed. *Van de Bogart v. Mari- e & M. P. Co.* 132 Wis. 367, 112 N. W. 443; *Kreider Vis. River P. & P. Co.* 110 Wis. 645, 657, 86 N. W. 662. he latter case it is said that most of the cases arising un- sec. 1636*j*, where there is a failure to guard, leave the tion of breach of duty on the part of the employer to the , unless there is no room for conflicting inferences. This t cannot hold as a matter of law that there was not suffi- t evidence of negligence on the part of the defendant to y the case to the jury. The jury having found that the ndant was negligent in failing to provide guards as re- ed by the statute referred to, the question of assumption azard by the deceased is not in the case, although other es of contributory negligence might be shown and might titute a defense. *Klotz v. Power & M. M. Co.* 136 Wis. 116 N. W. 770.

The deceased had been employed on top of this vat for nonths and had passed by and a short distance from the trap door forty or fifty times within the hour imme- ely preceding the accident, so that he was thoroughly

familiar with his surroundings and with the fact that t
trap door was open and with the danger to be apprehend
therefrom. The question as to whether the deceased shou
not be held to have been guilty of contributory negligen
as a matter of law is extremely close, and is therefore one
which considerable reliance must be placed upon the decisi
of the trial court who heard the testimony. *Powell v. As
land I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Bohn v. Racin*
119 Wis. 341, 343, 96 N. W. 813; *Nicoud v. Wagner,* 1
Wis. 67, 72, 81 N. W. 999; *Collins v. Janesville,* 117 W
415, 423, 94 N. W. 309. This court is of the opinion th
there was evidence from which the jury might infer that t
steam was so dense that the deceased became confused
partially lost his way in making his return trip, and walk
into the opening without being able to see it because of t
steam, or that, because of his inability to see, he deviat
from his regular course of travel, believing, however, th
he was pursuing it, and that it should not be here held as
matter of law that the deceased failed to exercise ordina
care. The writer of this opinion does not concur in th
view, and thinks that the court should have directed a ve
dict for the defendant because decedent's negligence was co
clusively established.

3. The plaintiff, before resting her case, was permitted
show that after the accident the defendant placed guar
around the opening caused by the opening of the trap doo
As proof tending to show negligence this evidence was i
competent and its receipt would be reversible error. *Ca
tello v. Landwehr,* 28 Wis. 522; *Lang v. Sanger,* 76 W
71, 44 N. W. 1095; *Anderson v. C., St. P., M. & O. R. C*
87 Wis. 195, 58 N. W. 79; *Kreider v. Wis. River P. &
Co.* 110 Wis. 645, 86 N. W. 662; *Odegard v. North Wis.
Co.* 130 Wis. 659, 110 N. W. 809. A jury would very n
urally construe the action of the defendant in placing guar
in position after the accident as an admission on its pa
that the dangerous place was not properly or sufficient

ded before. Such an inference might be altogether g, because, as is said in the cases cited, if such an in- ce were permissible, "the fact that a person at a cer- time commences using and exercising *extraordinary* care given case may be used against him to prove that before time he had failed to use *reasonable* and *ordinary* care." *llo v. Landwehr, supra; Lang v. Sanger, supra; Ander- . C., St. P., M. & O. R. Co., supra.* Proof that an al- danger was guarded against after an accident hap- d might well be considered by the jury as convincing nce of existing negligence before the repair was made. e accuracy of this rule is not questioned by the respond- ut it is argued that it is not applicable here because the nce was offered, not to show negligence, but to show t was feasible to place a guard around the opening. In *penning v. Rock,* 136 Wis. 372, 117 N. W. 805, this held that evidence of subsequent repair to a highway t be offered to rebut the contention of the defendant that the notice of injury served was so indefinite as to cation of the defect complained of that the town was d by it. We entertain no doubt that, if the defendant ffered proof to show that it was not practicable to guard pen space in the vat, such evidence might be rebutted owing that defendant had in fact guarded it. The evi- offered tended to show that the opening into which de- t fell might have been guarded. This fact might just ll have been proved by other evidence, and the real ques- s, Should the plaintiff have been permitted to offer the nce as part of her proof before resting her case, it being ttedly incompetent for some purposes? Under the de- s in *Grundy v. Janesville,* 84 Wis. 574, 578, 54 N. W. and *Baltimore & P. R. Co. v. Cumberland,* 176 U. S. 236, we shall have to hold that the evidence offered was etent, the purpose of the offer being restricted. In the *dy Case,* as here, the objectionable evidence was intro- as part of plaintiff's case in chief, as an examination

of the printed case shows. Had defendant requested th court to charge the jury that such evidence was no proof o negligence on its part, it would have been error to refuse t so charge. No request having been made, it was not erro for the court to omit the giving of any instruction on th subject. *McCoy v. Milwaukee St. R. Co.* 88 Wis. 56, 5 N. W. 453.

4. Contributory negligence was an affirmative defense, an there was no error in charging the jury that the burden o proof was on the defendant to establish it by a preponder ance of the evidence. *Gill v. Homrighausen,* 79 Wis. 634 48 N. W. 862; *Hoye v. C. & N. W. R. Co.* 67 Wis. 1, 2 N. W. 646; *Kelly v. C. & N. W. R. Co.* 60 Wis. 480, 1 N. W. 521; *Randall v. N. W. Tel. Co.* 54 Wis. 140, 1 N. W. 419. It is immaterial whether the evidence establish ing such negligence is given by the witnesses for the plaint iff or the defendant. The case of *Achtenhagen v. Water town,* 18 Wis. 331, relied on by appellant as establishin a different rule, simply holds that where the evidence offere in plaintiff's behalf raises an inference of contributory neg ligence he cannot recover unless he establishes a *prima faci* case showing that he was not negligent.

We think there was no error committed in refusing to ad mit evidence showing that the decedent had been intoxicate on former occasions. The evidence tending to show that h was under the influence of stimulants on the morning of th accident is very shadowy.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting in part*). I dissent from th decision that the deceased was not guilty of contributor negligence as a matter of law. I concur with the writer o the court's opinion on that subject.

A motion for a rehearing was denied October 5, 1909.

BARDON, Appellant, vs. O'BRIEN, Respondent.

April 1—October 5, 1909.

ds: Construction: Reservation or exception: Growing timber.

a conveyance of land, a clause "reserving the pine and cedar timber now growing or being thereon and the right to cut and remove the same" is an exception, not a reservation. The timber remains the property of the grantor, together with a right in so much of the soil as is necessary to sustain it, and he is not bound to remove it within a reasonable time.

PEAL from a judgment of the circuit court for Douglas ty: A. J. VINJE, Circuit Judge. *Reversed.*

his action was brought to recover the value of pine and timber which had been cut by the defendant from the E. ¼ of section 23, town 48 N., range 10 W., in Douglas ty, and which the plaintiff claimed he owned under a vation in a deed made by him to Michael Murray, dated ary 10, 1894, which reservation reads as follows: "Re- ng the pine and cedar timber now growing or being on and the right to cut and remove the same." On ary 11, 1894, Murray conveyed an undivided two-thirds e land to one Howard, excepting the pine and cedar tim- nd the right to cut and remove the same, and on Febru- 12, 1894, he quitclaimed to Howard an undivided two- ls without reservation. The defendant claims under e conveyances from Howard and wife to one E. H. Lee, by timber deed from Lee dated November 4, 1907. No eyance of the undivided one-third interest remaining in ray was shown. On August 3, 1898, the plaintiff sold Villiam J. Conness such pine timber as Conness should nd remove from said land by May 1, 1901. During the ers of 1898–99 and 1899–1900 one Smith cut and re- d certain pine from the land under the Conness permit. e of the cedar and no other pine than that taken by Smith

was sold by the plaintiff or removed under sale or permit from him. The court found as follows:

"(1) That on and prior to January 10, 1894, the plaintiff was the owner of the N. E. ¼ of section 23, township 48 N., range 10 W., in Douglas county, Wisconsin, and of all of the timber thereon; that on the 10th day of January, 1894, the plaintiff conveyed said land to one Michael Murray by warranty deed containing the following reservation: 'reserving the pine and cedar timber now growing and being thereon and the right to cut and remove the same;' that the defendant, through mesne conveyances from and under Murray and prior to the cutting of any timber by him, became the owner of all of the timber upon said land without actual notice or knowledge of any claim on the part of the plaintiff under said reservation.

"(2) The court finds that the defendant in the early part of the year 1907, in the winter, and in the following winter in the early part of the year 1908, cut and removed from the N. E. ¼ of section 23, in township 48 N., range 10 W., pine and cedar timber of the value of $375.

"(3) That the plaintiff did not say to John G. Howard at any time that he had exercised his rights under the reservation, had sold or cut the timber under said reservation, or anything in substance like this, and did not have the conversation with the witness John G. Howard as testified by him.

"(4) That in the month of August, 1898, the plaintiff sold to one Conness all of the pine timber upon the land above described which should be cut within a period of two years from date of such sale, and thereafter said Conness resold the same to one Smith, and said Smith thereafter, and in the winter of 1898 and 1899, cut over the land for the pine timber, taking off all of the pine timber which, in the usual course of business at that time, was deemed merchantable for lumbering purposes; that except as above the plaintiff has not sold or cut, or permitted the cutting of, any of the timber from said land.

"(5) That the plaintiff did not, except as to the pine timber sold to Conness, cut or remove, or attempt to cut or remove, the timber mentioned in the reservation, and that a reasonable time for the cutting and removing of the timber

r the reservation had expired before the defendant pur-
ed the timber upon said lands and before he cut or re-
ed the timber or any part thereof.

(a) That the plaintiff's deed to Michael Murray, con-
ng the reservation of timber as set forth in the answer
in, was duly recorded in the office of the register of
s for Douglas county, Wisconsin, on the 12th day of
uary, 1894, in Book 12 of Deeds, on page 542.

(b) That all of the pine and cedar timber cut and re-
ed by the defendant from said land was situated or grow-
thereon at the time of said reservation, and that none of
cedar timber situated or growing upon said land at the
of said reservation was ever cut or removed by the
ntiff or by any one claiming under him under said res-
tion.

(c) That said land at all times remained vacant and un-
pied, except as it was occupied for logging purposes by
Smith under the Conness permit in the winter of
8–99, and temporarily by the defendant in the winters of
6–7 and 1907–8, in the removal of the timber thereon.

(d) That said pine and cedar timber, while remaining on
land, did not interfere with any proposed or attempted
of the land by the owners thereof.

(e) That said pine and cedar timber so cut by the de-
ant constituted a very small part of the total timber on
land, and could not have been removed economically if
ed separately from other timber.

(f) That no logging operations had taken place on said
between the removal of certain pine under the Conness
nit and the logging by the defendant in the winters afore-

(g) That there was no oral or written agreement at any
between plaintiff and said Murray, or those claiming
er the latter, relating to the removal of the timber by
ntiff, other than such as is contained in the deed to said
ray.

(h) That the plaintiff was never notified or requested by
owners of said land to remove said timber."

nd as conclusions of law the court found:

(1) That the proper construction of the reservation in the
eyance by the plaintiff to Michael Murray on January

10, 1894, in the light of the circumstances and in accord-
ance with the intention of the parties, is that the plaintif
reserved all the pine and cedar timber upon said land which
he should cut and remove within a reasonable time after such
conveyance, and that, a reasonable time having expired prior
to the cutting of any of the timber by the defendant, the
plaintiff had no title thereto or interest therein.

"(2) That the plaintiff is not estopped from asserting
title to the timber under said reservation by reason of any
conversation with John G. Howard or any other person.

"(3) That the plaintiff is not entitled to recover in this
action, but the defendant is entitled to judgment dismissing
the action upon the merits, with costs."

Appellant filed exceptions to the findings of fact and con
clusions of law, and judgment was entered in favor of the
defendant, dismissing the action upon the merits, from which
this appeal was taken.

For the appellant there was a brief by *W. E. Pickering*
and *W. B. Kellogg,* and oral argument by *Mr. Kellogg.*

For the respondent there was a brief by *Luse, Powell &*
Luse, and oral argument by *L. K. Luse.*

The following opinion was filed April 20, 1909:

KERWIN, J. The vital question in this case is whether
under the clause in the deed reserving the pine and cedar
timber, the grantor was bound to remove it within a reason-
able time. There is considerable conflict of authority on the
question, many cases holding that such a clause amounts to
a reservation and not an exception, and that the timber re-
served is only such as shall be removed within a reasonable
time, while others hold that such a clause amounts to an ex-
ception of the timber from the grant. The phrase "except-
ing and reserving" is commonly used in deeds, and is some-
times held to amount to an exception of part of the prop-
erty which is the subject of conveyance, and sometimes to
reservation out of the estate conveyed, depending largely

n the intention of the parties, the subject matter of the
at, whether the thing excepted or reserved is a thing
ly created out of the lands and tenements granted, or
of the property in existence and excepted therefrom.
chard v. Lewis, 125 Wis. 604, 104 N. W. 989. Many
s are cited by respondent from other states holding that,
er reservations similar to the one here, the timber was
excepted, but only the right to enter and cut it, and that
n no time limit is specified for the entry and cutting the
implies that a reasonable time was intended. But the
rine of this court in *Rich v. Zeilsdorff,* 22 Wis. 544, is
without support in other jurisdictions. *Knotts v. Hy-
k,* 12 Rich. Law, 314; *Sears v. Ackerman,* 138 Cal. 583,
Pac. 171; *Whitaker v. Brown,* 46 Pa. St. 197; *Winthrop
Fairbanks,* 41 Me. 307; *Clap v. Draper,* 4 Mass. 266;
th Ga. Co. v. Bebee, 128 Ga. 563, 57 S. E. 873; *Starr v.
ld,* 5 Denio, 599; *State v. Wilson,* 42 Me. 9; *Craig v.
ls,* 11 N. Y. 315.

At an early day this court, in *Rich v. Zeilsdorff, supra,*
that a clause in a deed reserving to the grantor the tim-
with the right to enter and cut it is an exception of the
ber with sufficient interest in the soil to sustain it. In
case the reservation was, "reserving the right to cut and
ove all the pine timber or trees upon said premises and
of all cedar trees upon said premises, and the right is
eby reserved by the party of the first part to enter upon
lands at any time within two years next succeeding the
of this instrument for the purpose of cutting and re-
ing the trees or timber so reserved." The opinion is
ed upon the fact that the *right* to cut and remove only is
rved and not the *timber.* The distinction between an
ption and a reservation is discussed, and the court said:

"A reservation is always of something taken back out of
which is clearly granted, while an exception is some
of the estate not granted at all."

And it is held that where the timber is reserved it is a exception, since the timber is part of the realty and woul have passed to the grantee but for the exception, and that th property in the timber continues in the grantor, with th right in so much of the soil as is necessary to sustain it. I the *Rich Case* this court draws the distinction between a cas where the timber is reserved and the right to cut and remov it, and holds that where the timber is reserved the reserva tion is an exception, since the thing reserved is a part of th realty. This doctrine was again stated and approved i *Williams v. Jones,* 131 Wis. 361, 111 N. W. 505, which cas was approved in the late case of *Western L. & C. Co. v. Cop per River L. Co.* 138 Wis. 404, 120 N. W. 277.

It seems clear, therefore, that a reservation of timber in deed similar to the one before us, under the decisions of thi court, amounts to an exception of the timber from the gran Many of the authorities cited by counsel for respondent sup port his contention, namely, that reservations similar to th one in the instant case have been held to reserve only suc timber as should be cut within a reasonable time. But w think this court is committed to the doctrine that such a re ervation of timber amounts to an exception from the gran of the timber thus reserved, and that the rule should not no be departed from. We must therefore hold that the pine an cedar timber was excepted from the grant and remained th property of the plaintiff, and therefore he was entitled t judgment.

By the Court.—The judgment of the court below is re versed, and the cause remanded with instructions to rende judgment for the plaintiff for $375 and costs.

DODGE, SIEBECKER, and TIMLIN, JJ., dissent.

A motion for a rehearing was denied October 5, 1909.

ON and another, Respondents, vs. J. L. GATES LAND COMPANY and others, Appellants.

April 21—October 5, 1909.

al: Review: Immaterial errors: Right to review by party not appealing: Findings, when disturbed: Entire contracts of employment: Brokers: Recovery of commissions: Breach of contract: Wrongful attachment of land: Measure of damages: Punitory damages.

Where, in an action to recover commissions, it appeared that certain commissions became due before the trial, and the sales on which they were based were admitted without controversy as to the amount, objection that the commissions were not due at the time the action was commenced is technical and error in their allowance should be disregarded under sec. 2829, Stats. (1898).

The supreme court cannot inquire into alleged errors at the instance of a respondent who has not appealed from the judgment nor filed exceptions to the rulings alleged to be erroneous.

Where there is evidence to support a finding, and the finding is not clearly against the preponderance of the evidence, it will not be set aside.

A contract for commissions "to become due on one-quarter payment of the selling price of any piece of land sold" is apportionable and not entire, and under it whenever a payment is made amounting to twenty-five per cent. or more of the selling price of a tract of land, the commission becomes not only due but payable.

A contract of employment is for a term and is silent as to the time of payment, although the rate of compensation is at so much a day, week, or month, it is entire and indivisible and full performance must precede a right of recovery, in the absence of circumstances showing that the contract was not understood by the parties as entire; but if the contract contains language which obligates the employer to make partial payments of compensation it is divisible and action may be maintained on instalments as they become due before performance is completed.

Where the sufficiency of a complaint was not challenged by general demurrer, and the true contract of the parties, set up in the answer but imperfectly set up in the complaint, was established at the trial, and the parties litigated the issues aris-

ing out of such contract, error, if any, in overruling a de murrer *ore tenus* to the complaint on the ground that the im perfectly recited contract showed that plaintiffs had not per formed it, should be disregarded under sec. 2829, Stats. (1898).

7. An owner having breached his contract to pay to brokers in stalments of commissions as lands were sold, the brokers are relieved from continuing to make sales and are entitled to com missions on sales made, although there was no showing that the brokers were prevented from making further sales or were hindered in performance by the owner's refusal to make pay ments as agreed.

8. An attachment of land does not deprive the owner of its use occupancy, or enjoyment, except that he may be unable to sel until the attachment is dissolved; and interest on the value of the land is not the basis for ascertainment of the damages suffered in consequence of the attachment.

9. Compensatory damages allowed because of a wrongful attach ment should not exceed such actual damages as are the natura and proximate result or consequence of the wrongful act in suing out the attachment.

10. Punitory damages are not assessable as matter of right, and the question of their allowance or disallowance is one for tria courts and juries to pass upon. The supreme court will no reverse a judgment for failure to award such damages, nor wil it undertake to make an assessment thereof.

APPEAL from a judgment of the circuit court for Clark county: CHAS. M. WEBB, Judge. *Modified and affirmed.*

The material part of the complaint in the action alleged that on or about March 22, 1900, the plaintiff *Lester Tilton* entered into a contract with the defendants, whereby said plaintiff was employed to show prospective purchasers such lands as either of said defendants should require him to show and that defendants agreed to pay for such services, in the event of a sale being made of any lands in Clark county which the said plaintiff should be called upon to show pro spective purchasers, a commission of five per cent. of the sell ing price of the land as compensation for his services and ex penses if the purchaser had been procured through defend ants or their agents or employees, and ten per cent. of such selling price on sales made through the efforts of the plaintiff

ıout aid from the defendants in procuring the buyer; thereafter said *Tilton* formed a copartnership with his aintiff, *Roberts,* who assisted in carrying out said con- t with the knowledge and consent of defendants; that ntiffs sold lands pursuant to such agreement, and earned ommissions on account of such sales the amount of $6,000 and above setoffs; and that plaintiffs did and performed of the conditions of the contract on their part. Judg- ıt was demanded for $6,000 upon the cause of action ed. A second cause of action was set up, but is not in- ed on this appeal.

'he portion of the answer material, in so far as the ques- s presented on this appeal are concerned, sets forth that ntiffs breached their contract by failing to forward to endants moneys collected and notes received on land sales, by failing to work exclusively for defendants in selling r lands, all of which they were required by said contract ıo. For a first counterclaim the defendants set forth the ious breaches of the contract complained of, and averred by reason thereof they suffered damages to the amount $30,000. As a second counterclaim the defendants set h that the copartnership between the plaintiffs was ned July 16, 1900, and that on such date the account be- en the plaintiff *Tilton* and the defendants was stated, and as agreed that there was then due defendants $3,036.49, ch sum the plaintiffs, for a valuable consideration, agreed pay the defendants. Furthermore, that the plaintiffs ed to account for moneys and notes coming into their ds as agents, and sold lands other than those in which endants were interested, and induced prospective cus- ers, sent to Clark county by the defendants at their ex- se, to buy lands in which defendants had no interest. tain items of advances made by defendants to plaintiffs e also set forth as part of the counterclaim. The defend- ' damages on the second counterclaim are placed at

$5,667.47, which sum includes the amount of the alleged a
count stated.

For the most part the reply consists of denials of the for
going allegations of the answer. It admitted, however, tha
by virtue of the contract the plaintiffs were obliged to wor
exclusively for the defendants, but alleged a subsequent mod
fication of such contract, by the terms of which plaintif
were permitted to make such sales as they did make of land
belonging to parties other than the defendants.

The case was referred to a referee to hear, try, and dete
mine. The referee found, among other things, (1) tha
after the written contract (which consisted of two letter
passing between the parties) was made it was so modified tha
plaintiffs were authorized to sell other lands than those of th
defendants, where the prospective purchasers refused to bu
defendants' lands; (2) that plaintiffs made sales for defend
ants under said contract, upon which sales they were entitle
to commissions amounting to $5,275.95; (3) that there wa
paid plaintiffs on account of their services $806.47, and n
more; (4) that plaintiffs performed all the terms and condi
tions of their contract; (5) that plaintiffs were justified i
refusing to continue work under the contract by reason of th
failure and refusal of the defendants to pay past-due com
missions for services thereunder, and that defendants wer
not entitled to any damages because of plaintiffs' refusal t
continue work; (6) that defendants failed to sustain the al
legations of their second counterclaim; (7) that the attach
ment levied in this action upon the defendants' property wa
not levied maliciously, and that defendants suffered no dam
ages therefrom other than the costs and expenses incurred fo
counsel fees and disbursements in procuring the dissolutio
of the attachment, which damages were found to be $500
The referee found as a conclusion of law that the plaintiff
were entitled to judgment for $3,911.50, with interest an
costs.

The defendants moved the court to vacate certain portions the referee's report and to modify other portions thereof, for judgment upon the report as modified. The plaintiff likewise moved to modify the report in certain particulars and for judgment thereon as modified. The circuit court disallowed one item of commission amounting to $120 which had been allowed by the referee, and allowed another item of commission which had been disallowed by the referee, amounting to $300. The total payments made by the defendants to the plaintiffs or either of them after the contract was made amounted to $2,806.81. This sum was also allowed defendants by the court as a payment upon the transaction sued on. The referee disallowed a large portion of this amount because he held that the defendants were indebted to the plaintiff *Tilton* in a large amount of money for services rendered prior to the 22d of March, 1900, when the written contract was made, and offset a portion of the payments made after that date against the indebtedness which he found existed at that time. No other modifications were made in the referee's report by the court, and judgment was entered in plaintiffs' favor for $2,426 damages, besides interest and costs, from which judgment defendants appeal.

For the appellants there was a brief by *Winkler, Flanders, Bottum & Fawsett,* attorneys, and *L. M. Sturdevant* and *James G. Flanders,* of counsel, and oral argument by *Mr. Flanders.*

For the respondents there was a brief by *Blatchley & Gilkerson,* attorneys, and *F. T. Tucker* and *Homer C. Clark,* of counsel, and oral argument by *Mr. A. H. Blatchley* and *Mr. Clark.*

The following opinion was filed May 11, 1909:

BARNES, J. Numerous errors of fact and of law are assigned. Those involving questions of fact can be grouped under three heads: (1) Erroneous allowance of commissions

not earned or due when suit was commenced; (2) failure t
award damages against the plaintiffs for breaches of thei
contract, which it is claimed were established on the trial
and (3) refusal to hold that there was an account stated b
tween the parties on July 16, 1900. The errors involvin
questions of law that it is deemed essential to discuss in vie
of the conclusions reached on questions of fact are: (1) Wa
a cause of action stated in the complaint? (2) Were plaint
iffs justified in abandoning their contract before its exp
ration? (3) What was the measure of defendants' com
pensatory damages because of the wrongful attachment
(4) Should punitory damages have been awarded defend
ants because of malice on the part of the plaintiffs in mak
ing the attachment?

With reference to questions of fact little in the way o
discussion need be indulged in. A statement of the con
clusions reached should suffice. The record, containing ove
1,400 pages, affords abundant opportunity for a length
opinion, but we fail to see where discussion would accom
plish any useful purpose.

1. Commissions were allowed plaintiffs amounting to $20
on account of sales, where such commissions were not due a
the time the action was commenced by reason of the neces
sary amount not having been paid on the purchase price o
the lands sold. These commissions, however, became du
and payable long before the trial of the action. The fac
that the sales were made was admitted by the defendants o
the trial, and there can be no controversy about the amoun
due on account of the same. We think that under the fact
disclosed the objection is technical and the error is imma
terial, and should be disregarded under sec. 2829, Stats
(1898), and the plaintiffs should be permitted to recover th
amount of the items.

Commissions were erroneously allowed on sales to Henr
Bentz, Charles Oleson, and William Klass, amounting t

0. We find no testimony in the record to sustain the al-
ance of these items of commission, and respondents' coun-
does not point out any evidence that would warrant the
wance. The same is true of an item of $100 commission
wed on a sale to George Reitz. It seems quite apparent
there is a duplicate allowance of commission amounting
100 on a single sale covering the same land; one allow-
e being made on account of a sale to Kuhn & Reitz, and
other because of the sale of the same land to George Reitz.
evidence is reasonably satisfactory that the only sale
le was to the firm, and it does not appear to be disputed.
reference to another item of commission amounting to
, which it is urged was erroneously allowed on a sale to
. Kurtz, there is a scintilla of evidence in the record to
ain the finding, in that the plaintiff *Tilton* testified that
was entitled to the commission. He does not, however,
y the facts, which were testified to in behalf of the defend-
, which show satisfactorily that plaintiffs were not en-
d to the allowance. It follows that items of commission
unting to $235 were erroneously allowed and included
he judgment.

s a sort of an equitable offset to these items, counsel for
plaintiffs urge that certain items of commission amount-
to over $400, and to which plaintiffs were clearly en-
d under the testimony, were disallowed and should be
et against the errors committed against the defendants.
plaintiffs do not appeal from the judgment, and neither
e they filed any exceptions to the alleged errors which
referee and the court committed against them. With
record in this condition, we fail to see how the court can
uire into the erroneous disallowance of commissions to
ch plaintiffs were entitled.

. The appellants insist that the respondents violated their
ract by levying an attachment on the appellants' prop-
; by making threats to prevent sales before and after

the levy; by inducing prospective buyers to purchase lan other than those of the appellants; by circulating repor that appellants were selling lands to which they had no titl by informing customers that some of the appellants' lan were no good; by maliciously attaching 7,240 acres of lan worth over $60,000 to satisfy the claim sued on amountin to $6,000; and by preventing sales of land being made b reason of the attachment. A large amount of damages claimed in one of the counterclaims interposed by reason the aforesaid acts. The findings of fact on these variou subjects are against appellants. As to some of the breach complained of, we think they were quite conclusively esta lished by the evidence. As to those which are so esta lished, we are unable to find that any legitimate items damage were proven.

3. There is sufficient evidence to support the finding the referee that no account was stated between the parti in July, 1900. The same is true of the finding to the effe that defendants consented to a modification of the writte agreement so as to permit the plaintiffs to negotiate sales improved farm lands where they were unable to sell the wi lands of the defendants. To our minds the evidence neither clear nor satisfactory in support of the finding th plaintiffs were authorized to sell wild lands other than tho of the defendants, and it is altogether improbable. Th evidence is conclusive that at least two such sales were mad and we should have been better satisfied had the finding bee that plaintiffs breached their contract in this regard. Hov ever, there is evidence to support the finding made, and it not so clearly against the preponderance of evidence that should be set aside. Under all the circumstances disclose by the evidence, the damages recoverable for the breach, one existed, might well have been found to be only nomina

4. It is urged that the contract as established on the tri is entire, and that there was nothing due plaintiffs ther

er until the expiration of one year from its date, and that plaintiffs, having abandoned performance before the year red, cannot recover. The contract, after providing the unt of commission that should be paid on sales as made, recited that such commissions were "to become due on quarter payment of the selling price of any piece of land " We think this language, as used in this particular ract, is plain and unequivocal, and means that, when- a payment was made amounting to twenty-five per cent. ore of the selling price of the tract of land, the commis- on the sale would not only become due, but would also me payable to the plaintiffs. The plaintiffs evidently nderstood the language, and the defendants from time to made payments which would indicate, although perhaps conclusively establish, that they placed the same construc- thereon. If there is any doubt upon the point, it is y eliminated by testimony given by the officers of the ndant companies on the witness stand, which unmistak- showed that their construction of this particular clause not different from that of the plaintiffs.

he distinction between an entire and an apportionable ract is pointed out in *Hildebrand v. Am. F. A. Co.* 109 171, 85 N. W. 268, where the rule as stated in Wood Master and Servant (§ 84) is quoted and approved in the wing language:

'If the contract is for a term, although the rate of com- ation is at so much a day, week, or month, yet, if the ract is silent as to the time of payment, it is entire and visible, and full performance must precede a right of very,' in the absence of circumstances showing that the ract was not understood by the parties as entire."

, however, the contract contains language which obligates mployer to make partial payments of compensation, then divisible, and action may be maintained on instalments ey become due before performance is completed. *La*

Coursier v. Russell, 82 Wis. 265, 52 N. W. 176; *Clark*
Clifford, 25 Wis. 597.

It is urged, however, that the contract established on t
trial was not the contract which was made part of the co
plaint in this action, there having been omitted from the co
annexed to the complaint the words above quoted, and th
while the complaint in terms alleged performance on the pa
of the plaintiffs, still the contract which was made a pa
thereof affirmatively showed that plaintiffs had not pe
formed, and that therefore the demurrer *ore tenus* shou
have been sustained. Under the decisions of this court
the cases of *Goodwin v. Merrill,* 13 Wis. 658, and *Clark*
Clifford, 25 Wis. 597, we think that even the contract a
nexed to the complaint was an apportionable contract. T
appellants rely on the cases of *Hildebrand v. Am. F. A. C*
109 Wis. 171, 85 N. W. 268; *Widman v. Gay,* 104 Wis. 27
80 N. W. 450; *Glidden v. Meyer,* 110 Wis. 1, 6, 85 N. W
656; *Koplitz v. Powell,* 56 Wis. 671, 14 N. W. 831; *Diefe*
back v. Stark, 56 Wis. 462, 14 N. W. 621; *Jennings v. Lyon*
39 Wis. 553; *Green v. Hanson,* 89 Wis. 597, 62 N. W
408; *McDonald v. Bryant,* 73 Wis. 20, 40 N. W. 806; *Man*
towoc S. B. Works v. Manitowoc G. Co. 120 Wis. 1, 97 N. W
515; *Williams v. Thrall,* 101 Wis. 337, 76 N. W. 59
Warehouse & B. S. Co. v. Galvin, 96 Wis. 523, 71 N. W
804; *Cohn v. Plumer,* 88 Wis. 622, 60 N. W. 1000; an
Malbon v. Birney, 11 Wis. 112, in support of the propo
tion that the contract was an entire one. The question
not material to a decision of the case. The sufficiency
the complaint was not challenged by the general demurre
The true contract was set up in the answer and was esta
lished on the trial, and the parties litigated the issues ar
ing out of the contract set forth in the answer. We ente
tain no doubt that such contract was apportionable. Und
these circumstances, if error was committed in overruling t
demurrer *ore tenus,* we should hold on this appeal that it w

chnical and harmless error which should be disregarded r sec. 2829, Stats. (1898). A reversal because of the complained of would simply mean that the plaintiffs ld be permitted to amend their complaint so as to make nform to the recitals of the answer as to what the con- was, and that the parties should be subjected to a re- of the issues that were fully litigated in the former trial. It is urged that it was error to find as a conclusion of that the mere failure to pay commissions relieved the ntiffs from continuing to perform the contract on their in the absence of proof that plaintiffs were prevented performance or that they were hindered in performance he refusal of defendants to make payments as agreed. upport of the contention the following cases are cited: *henson v. Cady,* 117 Mass. 6, 9; *Winchester v. Newton,* len, 492, 494; *Myer v. Wheeler,* 65 Iowa, 390, 21 N. W. *Osgood v. Bauder,* 75 Iowa, 550, 39 N. W. 887; *Black- v. Reilly,* 47 N. J. Law, 290, 1 Atl. 27; *Mersey S. & I. v. Naylor,* L. R. 9 Q. B. Div. 648. The majority of cases hold that, where a contract is made for the sale oods which is to be executed by a series of deliveries and nents, default by either party with reference to one or of the stipulated acts will not ordinarily discharge the r party, unless the conduct of the party defaulting be as to evince an intention to abandon the contract or a gn to be no longer bound by its terms. In *Myer v. eler, supra,* it is held that the rescission of a divisible ract will not be permitted for a breach thereof unless breach goes to the whole consideration. The Massa- etts case cited is not in harmony with the other cases. hat state it is held that if a contract for the sale of per- l property requires deliveries from time to time and pro- s for payments being made at stated intervals, failure to for any instalment of goods shipped when payment is excuses the vendor from making further deliveries un-

der the contract. *Stephenson v. Cady, supra; Morton Clark,* 181 Mass. 134, 63 N. E. 409; *Nat. M. & T. Co. Standard S. M. Co.* 181 Mass. 275, 63 N. E. 900; *Nat. Co. v. Vulcanite P. C. Co.* 192 Mass. 247, 78 N. E. 41 This court has held that where a person was employed at stated salary per year, payable quarterly, the employee w justified in refusing to continue work under the contra after a quarterly instalment of his wages had become due a payment was refused. Such decision was reached in a ca where there was no showing made on the part of the e ployee that he could not continue performance without e barrassment because of the fact that he was unable to g the salary due him. *La Coursier v. Russell,* 82 Wis. 26 52 N. W. 176. We think this case is decisive of the que tion presented and that it is well supported by other autho ity. See, further, *Jung B. Co. v. Konrad,* 137 Wis. 10 118 N. W. 548.

6. The referee allowed the defendants $500 for attorn fees and other expenses incurred in securing a dissolution the attachment placed upon their property. Otherwise damages were allowed because of the attachment, which mained upon the attached property about five months. R fusal to allow additional damages is assigned as error. appeared from the testimony that the lands attached we rapidly appreciating in value while they were tied u Counsel contend, however, that interest upon the value of t attached property while the attachment rested on it should least be allowed. It is argued that such is the rule of da ages applicable in the case of a wrongful attachment of pe sonal property, and the cases of *Booth v. Ableman,* 20 W 602, 609; *Beveridge v. Welch,* 7 Wis. 465; *Anderson Sloane,* 72 Wis. 566, 40 N. W. 214; and *Union Nat. Ba v. Cross,* 100 Wis. 174, 75 N. W. 992, are cited to suppo the contention made. It is urged that there is no differen in principle between the two kinds of attachment, and th

rule should be extended so as to include real estate. We
x there is a substantial reason why interest should be al-
d as damages as to one species of property and should
be allowed as to the other. Compensatory damages are
ved as compensation. When personal property is at-
ed, the owner is deprived of its possession, use, and en-
ent, and it is right that he should be compensated for
oss of the use of that which was taken from him by al-
ng interest on the value thereof when such allowance fur-
es adequate compensation for the actual damage sus-
d. A wrongful attachment of personal property is some-
akin to a forced loan of it. Interest may not be ade-
e compensation, and, when it is not, other damages are
ved. When interest is adequate to liquidate the dam-
it may well be considered the minimum recovery for
leprival of the owner of the use of his property. An at-
nent on real estate does not deprive the owner of the use,
ancy, or enjoyment of the property in any sense, save
he may not be able to sell it until the attachment is
lved or released. If a sale has been prevented by the
hment, the loss consequent upon such prevention is
arily capable of reasonably definite ascertainment and
. The compensatory damages allowed because of a
gful attachment should not exceed such actual damages
e the natural and proximate result or consequence of the
gful act in suing out the attachment. We do not think
interest on the value of the real estate attached can be
to furnish any safe basis for ascertainment of the dam-
suffered in consequence of the attachment.

It is urged that the attachment was maliciously levied
that it was error to refuse to award punitory damages.
e are many items of evidence, aside from the fact that
alue of the property attached was more than ten times
mount of the claim sued on, which tend to show that the
tiffs were actuated by improper motives in making the

attachment. The findings are against the defendants on t point. Whether they are right or wrong is an academic qu tion. Courts generally hold that punitory damages are n assessable as a matter of right, and this court has so held *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 68 N. W 961, where the authorities on the point are reviewed. T question of the allowance or disallowance of punitory dam ages is one for trial courts and juries to pass upon, and th court will not reverse a judgment for failure to award su damages, nor will it undertake to make an assessment of t same.

The judgment in the action awards plaintiffs $2,426 dam ages, together with interest thereon from February 21, 190 the date of the filing of the referee's report, together wi the costs of the action, taxed at $393.29. Interest was a lowed by the referee in his computation from December 2 1900, the date of the commencement of the action, and su interest is included in said sum of $2,426. The judgme should therefore be decreased by the sum of $235, togeth with interest thereon between the dates last mentioned the legal rate, amounting to $30.27, making in all the su of $265.27.

By the Court.—The judgment of the circuit court is mo fied by awarding the plaintiffs the sum of $2,160.73, togeth with interest thereon from February 21, 1903, and the co of the action as taxed; and as so modified the judgment the circuit court is affirmed. The appellants are award costs in this court.

A motion for a rehearing was denied October 5, 1909.

ANKE and another, Respondents, vs. VILLAGE OF GENOA JUNCTION and others, Appellants.

April 22—October 5, 1909.

ages: Sidewalks: Ordinance fixing grades: Wrongful construction: Removal.

A village ordinance permanently establishing the grades of streets at the centers and at the parkings at the curb lines, and providing that "said parking shall rise from such curb line to the lot line at a uniform grade of not less than one fourth of one inch to each foot," fixes the grades for the sidewalks, superseding grades theretofore prescribed.

Where, with full knowledge of a change in the grade prescribed for a sidewalk and in defiance of a written notice and order from the village board, a lotowner constructs a walk in accordance with the former grade, the village officials have the right to order the removal of such walk and, in case of disobedience, to proceed to its demolition.

APPEAL from a judgment of the circuit court for Walth county: E. B. BELDEN, Circuit Judge. *Reversed.*

Action to enjoin a destruction of or interference with a ent sidewalk constructed by plaintiffs in front of their iness premises on Mill street in the village of *Genoa Junc*. The facts were stipulated, whereby it appeared that in 3 a survey was made by one Child, giving grades for ks in the village, which was "accepted and adopted by the age board." August 16, 1904, Ordinance No. 21 was pted "permanently establishing the grades and curb lines certain streets and avenues," which prescribed the grades he centers of said streets and established the grades of "the king on said streets and avenues" in following words:

"The grade at the parkings at the curb line shall be the e as the established grade at the middle of the street or nue opposite; and said parking shall rise from such curb to the lot line at a uniform grade of not less than one rth of one inch to each foot."

The grade of the parking under this ordinance in front o plaintiffs' premises was about nine inches lower than th grade specified at that place in the Child survey. In 190 plaintiffs proceeded to build upon their premises a bric building for a retail store, which, owing to the defectiv drainage, was several feet above the natural surface of th ground and above the prescribed grade for the street. Abou September, 1906, the plaintiffs proceeded to construct a per manent cement walk in front of said store within the lim its of the street substantially in accordance with the grad specified in the Child survey, which did not correspond wit other walks in said block, being higher than some and lowe than others, but considerably above the actual surface of th ground.

Upon commencement of the construction of said cemen walk and about August 24, 1906, the village board notifie in writing to the plaintiffs that their sidewalk was in defi ance of Ordinance No. 21 and ordered them to lower th same in accordance therewith; and on October 15, 1906, th board passed a resolution requiring such conformity and di recting the village board to rebuild it in case of noncompli ance within twenty days, all of which was notified to th plaintiffs. Further notice was ordered to the same effect o October 25th and again on November 15th, the last in at tempted compliance with ch. 115, Laws of 1905, after which the plaintiffs not complying, the village officials proceeded t remove the old sidewalk for the purpose of rebuilding it i accordance with such resolutions, and the present action t enjoin them and the village was brought.

The court decided that the Child survey still remains ef fective to establish and prescribe the grades for sidewalks and that, plaintiffs having erected a permanent sidewalk i accordance therewith, the same cannot be demolished by th village authorities, and entered judgment permanently en joining them from destroying and removing or in any way

erfering with the sidewalk in its present condition until street shall be graded; from which judgment all of the endants appeal.

For the appellants there was a brief by *Geo. W. Taylor* *John C. Slater,* and oral argument by *Mr. Taylor.*

For the respondents there was a brief by *Simmons, Nelson Walker,* and oral argument by *John B. Simmons.*

The following opinion was filed May 11, 1909:

DODGE, J. Without indicating concurrence in the view of trial court that, even if the Child survey were unrepealed, ourt of equity should restrain the government of a village n removing what it deemed an improper or dangerous icture within the limits of the street, we have been brought lisagreement as to the persistency of the grade for side- ks prescribed by adoption of that survey in 1903. After eful consideration we are unable to view Ordinance 21 otherwise than as a general designation of the grade the streets therein named throughout their length and dth. The industrious provision for that portion of the et extending from the curb to the lot line seems to us lly unambiguous. It would be absurd to declare the le of that portion of the street and still to leave the ques- of the elevation of sidewalks to the will or whim of each wner, each of whom might elevate far above or depress w the established grade. The sidewalk, therefore, which ssentially a part of the street, might be filled with ups downs, constituting pitfalls and traps for which the vil- must bear responsibility. Such general purpose of the r enactment results in a repeal of any implied authority viously conferred by the village board to erect sidewalks suant to a different grade. These plaintiffs, with full wledge of the change thus made, with full notification n the village board that it had been enacted with the pur- e of superseding the Child survey, and in violation of the

clearest prohibition, defiantly erected this wrongful structure within the limits of a public street. Under such circumstances we can recognize no right to persist in such a trespass simply because it had been accomplished. The right of the village government under such circumstances to order the removal of such an obstruction and, in case of disobedience, to proceed to its demolition, is essential to the performance of the duties imposed by law upon such government. Ch. 115, Laws of 1905; subd. 11, sec. 893, Stats. (1898); *McCullough v. Campbellsport,* 123 Wis. 334, 101 N. W. 709. It should not be interfered with by a court.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action.

Upon a motion by the respondents for a rehearing there was a brief on their behalf by *Simmons & Walker,* and a brief on behalf of the appellants by *Geo. W. Taylor* and *John C. Slater.*

The motion was denied October 5, 1909.

McNaughton, Appellant, vs. Des Moines Life Insurance Company, Respondent.

September 14—October 5, 1909.

Life insurance: Agency contract with insured: Credits thereunder, how applied on premiums: Estoppel: Forfeiture: Waiver: Unlawful rebate of premiums through agency contract: Evidence: Effect on policy: Lapse: Reinstatement.

1. A life insurance company having given a person with his policy an agency agreement, stipulating to pay him annually a *pro rata* part of a specified percentage of all premiums paid for the ensuing ten years on business written in specified territory, such payment to be made within thirty days after the anni-

versary date of the agreement, coinciding with the last day for paying annually a policy premium with a specified penalty to prevent lapsing, and the premiums having been made payable annually with an option to pay quarterly, and the assured having been duly specifically notified of the due date and amount of the second policy premium, the first apportionment under the contract being applied thereon, and he having paid accordingly, and due notice according to custom having been given as to the third premium and second agency apportionment and payment made of the quarterly amount, less such apportionment, and the company, while retaining the money, having claimed that only one quarter of the agency apportionment was applicable on a quarterly premium payment, and demanded payment of an additional amount equal to three fourths of the agency apportionment within the thirty days for payment with the added penalty, which demand was not complied with, and thereupon the company having invited the assured to apply for reinstatement under the agreement in the policy in that regard, representing that, by the contract, he was entitled to credit of only one quarter of such apportionment on a quarterly premium, and application having been made accordingly and allowed, the additional payment being the same as the unpaid agency amount due and payable as aforesaid:

(a) The giving of the premium notice in the second instance, as in the first, estopped the company from claiming that the entire agency apportionment was not applicable upon the amount payable on the policy within the time stipulated for payment of such apportionment.

(b) The premium notice showing application of the agency apportionment in the second as in the first instance, constituted an actual payment of the agency apportionment fully executing the rebating contract, if such there were, for the quarter the policy premium was payable.

(c) The notice to the assured after payment of the amount, unsatisfactory to the company, demanding only an additional amount equal to three fourths of the agency apportionment, waived the penalty for not making payment on the exact due date of the premium if a penalty were thereby incurred.

(d) There having been due and payable to the assured on the contract by the day limited for paying the policy premium, an amount equal to the balance claimed by the company on the policy, it was bound to apply the credit if necessary to prevent a lapsing, and the application should be treated as having been in effect made by operation of law.

(e) The assured having acted on the false representations

of the company in submitting to its claim that the policy had lapsed was not affected by the law of surrender of rights by acquiescence.

2. If an insurance company makes, ostensibly, an agency contract with a policy-holder at the date of his policy, all as one transaction, for the purpose, in fact, of rebating the cost of the insurance, stipulated in the policy, such contract is unenforceable.

3. The circumstance of a life insurance company contemporaneously making an insurance agency contract with, and issuing to a person a life policy, the contract stipulating for payment to the assured for services, not definitely mentioned except by reference to an application for such contract, not produced, of a percentage each year of the premiums received in such year for insurance written in specified territory, is not of itself sufficient to show with reasonable certainty that the purpose of the contract is to circumvent the statutory prohibition against rebating policy premiums.

4. Where mere circumstances are reasonably consistent with a theory of violation of a penal statute and also inconsistent therewith, the latter should prevail in the absence of corroborating evidence.

5. An executed agreement for rebating a policy premium contrary to the statute on the subject renders the rebater liable to the statutory penalty but does not render the policy void or voidable.

6. If money is absolutely due and payable from an insurance company to a policy-holder before the due date of his premium the company should apply the credit if necessary to save the policy and in judicial proceedings involving the matter such application should be conclusively presumed to have been made especially if such had been the custom of the company as to the particular policy.

7. If a person, erroneously supposing his policy to have lapsed his view in that regard being induced in whole or in part by a false position on the part of the insurer, applies successfully for reinstatement under the clause of the policy permitting it he is not precluded thereby from thereafter insisting that the policy did not in fact lapse.

8. If a person with knowledge, actual or constructive, so acts in regard to contractual relations that the reasonable inference under all the circumstances is that he has abandoned a claim of right, and the adverse party in such relations acts on the faith of such inference, as a general rule an effectual intent to waive is implied though there is no such intent in fact, an

even if there be an undisclosed intent to the contrary, and regardless of any element of estoppel strictly speaking.

In case of an insurance company seeking to reap advantage from its own turpitude as to violating the law against rebating, for the purpose of avoiding a policy agreement, the burden is upon it to establish the facts in that regard to a reasonable certainty.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Reversed.*

Action by a beneficiary to recover on an insurance policy. e policy was issued by defendant, an Iowa corporation, ne 15, 1903, at Whitehall, Trempealeau county, Wiscon- It required payment of a premium of $156.10 at the iance of the policy and the same annually thereafter, or a cified amount semi-annually or quarterly, the latter rate ng $41.35 per quarter. It provided in case of default an extension of thirty days with the privilege of making yment by adding ten cents per thousand dollars of the inance, otherwise for a lapse subject to reinstatement of the icy upon the assured furnishing a satisfactory certificate good health signed by the assured and a reputable physin on a form furnished for that purpose and approval by tain specified officers; also that the policy should be incontable after two years in case of all premiums up to that e having been duly paid; further, in case of the policy havlapsed after full payment of premiums for three years, t the assured should have certain specified rights. The intestable clause was satisfied. The policy was issued purnt to an application stipulating that all statements conned therein should be regarded as material to the risk and rranties.

Accompanying the policy there was a special agency con-t, entitling the assured, so long as the contract was kept force, to a *pro rata* proportion annually for a period of nty years of seven per cent. of all premiums paid for the

ensuing ten years on business written in this state, the sar
to be taken from the expense element of such premiums ar
apportioned annually within sixty days after the 1st day
January in each year, and paid within thirty days after t
anniversary date of the contract. February 17, 1904, d
fendant gave the assured notice of an apportionment in h
favor of $13.23. Seasonably it gave him the usual premiu
notice of the due date of the annual premium for 1904, d
ducting the $13.23, though it was not payable till July 15
thereafter. He sent the balance pursuant to the notice.
was accepted. Seasonably for 1905 defendant gave the a
sured written notice of an apportionment in his favor und
the agency contract of $14.60, payable July 15, 1905. N
tice of the next annual premium was given, crediting there
the $14.60, in harmony with the transaction of the previo
year. The assured elected, as he had a right to do, to p
June 15, 1905, a quarterly premium. For that he remitt
the proper amount less the apportionment of $14.60. H
was thereupon notified, he could not be permitted, in such
case, to deduct more than a quarter of such apportionme
and to remit $10.95 to make up full quarterly payment. H
failed to do so or claim any right under the thirty-day exte
sion element of the policy, and was thereupon notified that
had lapsed, leaving him the privilege of reinstatement
provided therein, and sent him, at the same time, a form f
the requisite health certificate. He furnished the certifica
properly executed. He stated therein that he was of sou
constitution, in good health, and that since the date of t
original application he had not been afflicted with any sic
ness or disease whatever, nor consulted or been attended
any physician, and warranted such statements to be tru
agreeing that otherwise the insurance should be void. A
tached thereto was a physician's certificate of good health a
risk. Due payment of the requisite amount was made, t
application for reinstatement approved, and a certificate

lingly issued July 28, 1905, providing that its validity ıld depend upon the warranties contained in the applica- therefor being true, and the assured being in good health of temperate habits on the date of the reinstatement. died February 10, 1906.

Conditions precedent to the commencement of the action e satisfied. The pleadings put in issue the question of ther the policy lapsed for nonpayment of the premium of e 15, 1905, whether the declarations in the application reinstatement that the assured, at the date thereof, was ood health, and that since the date of the original appli- on he had not been afflicted with any disease or sickness tever, nor consulted or been attended by any physician, e true, and pleaded that immediately upon discovering ı declarations to be untrue it disclaimed any intention to ropriate the money paid for the reinstatement and that as, thereafter, at all times in readiness to return the same he person, or persons, entitled thereto.

The cause was submitted to the jury on the evidence in re- t to the issues raised as aforesaid, resulting in a special lict, as follows:

(1) Was said A. J. McNaughton of sound constitution he 25th day of July, 1905, when he signed the certificate einstatement? *A.* Yes.

(2) Was said A. J. McNaughton in good health on the ı day of July, 1905, when he signed the certificate for statement? *A.* Yes.

(3) Had said A. J. McNaughton been afflicted with any ase or sickness whatever between the date of his applica- for the policy of insurance in question and the date when igned the certificate for reinstatement of lapsed policy on 25th day of July, 1905? *A.* No.

(4) Had said A. J. McNaughton consulted or been at- led by any physician at any time between the 15th day une, 1903, and the 25th day of July, 1905? *A.* No."

he court, on motion, changed the answer to the fourth stion from "No" to "Yes," refused to change the answer

to either the first, second, or third question, and rende judgment dismissing the action with costs. The plain appealed.

For the appellant there was a brief by *Anderson & Ek* and oral argument by *H. L. Ekern.*

For the respondent there was a brief by *R. S. Cowie Edward Lees,* and oral argument by *Mr. Lees.*

MARSHALL, J. Respondent's counsel make the point t the contract which accompanied the policy was an evasion the anti-rebate law, rendering the credit which assured plied on his quarterly payment ineffectual, thus leaving h in default and causing a lapse of the policy. The trial co does not appear to have passed on that question, but if co sel be right, the fact, in one aspect of the case, must ren the judgment right even if the court below was wrong as the particular matters complained of by appellant.

It was held in *Urwan v. N. W. Nat. L. Ins. Co.* Wis. 349, 103 N. W. 1102, that a transaction, somew similar to that which occurred in this case, pursuant to agreement on the part of the insurance company indicat that the ostensible purpose was not the real one, but was rebate the regular cost of the insurance as an inducement taking out the same, was unenforceable. It must be noted t there was proof in that instance, indicating the intention the parties, other than the mere production of an agency c tract, as in this case referring to an application not offered evidence that might explain the transaction. There is connection here, on the face of the papers, between the agei contract and the policy, except the mere fact that the t writings were made at the same time. In the *Urwan C* the payments agreed to be made to the so-called agent w fixed in amount and the policy premiums were to be li wise, as the company represented. That was quite sign cant as showing that the real purpose was to rebate the lat

out any equivalent consideration. There were other cir-
tances in proof showing conclusively that such was the
al intention. In this case there was an entire absence
ch proof, while the agency contract provided for com-
ation contingent upon the business written in this state,
the consideration to be rendered therefor may well be
med to have been specified in the application referred
the writing, which, as before indicated, was not pro-
l in evidence. Under the circumstances there is room
for suspicion that the purpose of the transaction was to
the anti-rebate law. Contractual transactions are not
avoided in favor of one of the parties who seeks to es-
his obligations, on mere suspicion. The court will not
me from circumstances which are consistent or incon-
t, according to the viewpoint from which they are meas-
with violation of a penal statute, that such violation oc-
d in the particular case, without sufficient corroborating
nce to establish it to a reasonable certainty. While courts
d firmly enforce the policy of the law against rebating
should not go so far as to cast the burden of proof upon
icy-holder to show that there was no such violation, upon
ompany involved seeking to escape its obligation on the
y that it is a lawbreaker.

ere is a further reason why respondent cannot invoke
nti-rebate law to defeat the policy claim in this case.
aun v. Pac. Mut. L. Ins. Co. 131 Wis. 555, 111 N. W.
it was held that an executed agreement for rebate of a
y premium, while constituting ground for punishing the
er as the statute provides, does not render the policy
—that the latter purpose was not within the fair mean-
f the statute; and that the rule of *Urwan v. N. W. Nat.*
s. Co., supra, goes no further, as to the rights of a pol-
older, than to render executory agreements for the re-
g of premiums not specified in the policy unenforceable.
e view this case, if the purpose of the agency agreement

was to rebate the premiums specified on the face of the poli
it was fully executed as to the premium in question and u
the policy matured.

As indicated in the statement, before the first premi
became payable after the assured received his first cre
upon the agency contract, he was duly notified thereof, a
of such credit. As between the parties, on the face of
record, when that premium fell due June 15, 1904, respo
ent owed the assured $13.23 as a credit on such contract, p
able July 15th thereafter, or within the time such premi
was payable by addition of the trifling sum of fifty cents
a penalty for not making payment at the precise due da
Previous to such date, as appears, respondent notified the
sured of how it proposed to treat the agency credit by se
ing him a notice of the premium, applying thereon su
credit. From that circumstance the assured had a right
assume that such credits in the future would be likew
treated. The respondent was precluded by the plain
principles of estoppel from claiming to the contrary to
prejudice of the assured, as to any subsequent payment, ma
before it gave the assured notice of a change of its position

When the next annual payment came due, subject to
right of making quarterly payments, respondent gave the
sured the usual premium notice, applying the agency cre
as before. Then for the first time, and after the quarte
payment was made with the credit and cash, and after
time for payment without incurring the aforesaid penalty
fifty cents, the assured was notified that:

"In cases where the premiums are paid quarterly,
fourth of the apportionment is credited upon each quarte
payment. Therefore, it will be necessary for you to send
$10.95 additional in order to receive full credit for the c
rent quarterly under the policy referred to."

That was an entire change of front, as the assured ha
right to view the matter.

ere was nothing in the writing indicating how the y credit should be applied or that the same should be ed at all. The communication quoted involved a sug- on that the company asserted a right to hold the balance e agency credit and apply the same in $3.65 credit in- ents on quarterly policy premiums as they fell due dur- he year, while the agreement was for payment of the en- amount by July 15, 1905. The assured had a right to ne that the mere use of the $14.60 for the thirty days, nting to about seven cents, was not considered by re- dent of any consequence and that it would waive the se due date of the credit as before. Moreover, in call- for the additional payment of $10.95 after the penalty incurred, such penalty was waived. So on July 15th after, by respondent's conduct, it was permissible for ssured to pay the additional $10.95, the precise amount due of the agency credit in any view of the case, and a forfeiture, and he may well have assumed it would be used to save the policy from lapsing according to the established rule that it is the duty of an insurance com- to apply dues from it to an assured, presently payable, his premium likewise payable, if necessary to prevent feiture, especially where, from previous transactions be- the parties, the assured has a right to rely upon such cation being made.

e contention of appellant's counsel on the point last dis- d we regard as sound and abundantly supported in prin- by authorities cited to our attention and many others. *v. N. W. Mut. L. Ins. Co.* 39 Wis. 397; *Matlack v.* , 180 Pa. St. 360, 386, 36 Atl. 1082; *Van Norman v.* *. Mut. L. Ins. Co.* 51 Minn. 57, 52 N. W. 988; *Girard s., A. & T. Co. v. Mut. L. Ins. Co.* 97 Pa. St. 15; *Chi- L. Ins. Co. v. Warner,* 80 Ill. 410; *Ins. Co. v. Dutcher,* . S. 269, 272; *Northwestern Mut. L. Ins. Co. v. Ross,* a. 199; *Northwestern Mut. L. Ins. Co. v. Fort's Adm'r,*

82 Ky. 269; *Franklin L. Ins. Co. v. Wallace,* 93 Ind. *Northwestern Mut. L. Ins. Co. v. Little,* 56 Ind. 504.

It would be useless to argue that application of the agen credit was not in fact made, therefore the agreement to p the same was executory, and within the condemnation of t *Laun Case* because, primarily, as we have seen, it was not tablished that the agency agreement was a rebating contra secondarily, because the application was in fact made, as t assured had a right to assume when the premium notice w sent; and, thirdly, since in any event it was the duty of t respondent to make the application on or before July 1 1905, the assured had a right to assume that such applicati would be made if necessary to save his policy, and the cou in such a case must treat that which ought to have been do as having been done.

But it is insisted, on respondent's part, that, by the assur applying for reinstatement of the policy, treating the same having lapsed, and being reinstated accordingly, there w conclusive acquiescence in the claim of respondent in that gard. On that *Teeter v. United L. Ins. Asso.* 159 N. Y. 41 416, 54 N. E. 72, is relied on. It is the opinion of the cou that the rule there adopted is somewhat harsh and carries t doctrine of loss of rights by mere waiver rather to the lim if not beyond, its boundaries as laid down by this court *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563.

There can be no waiver without at least implied intent waive based on knowledge, actual or constructive, of the fac Where the reasonable inference from the whole situation tween parties in contractual relations, is that one of the with knowledge, actual or constructive, has waived or aba doned a claim of right, and the other, relying thereon, h acted accordingly, generally speaking, an effectual intent waive is implied "regardless of whether there was an actu or expressed intent to waive, or even if there was an actu but undisclosed intention to the contrary," whether there

element of estoppel, strictly so called, or not. Such is doctrine of mere waiver as approved in the *Pabst B. Co.* . Whenever a case falls clearly within that principle ust be held to be governed thereby. Those arising under rance contracts cannot be excepted, neither can an ex- ion be made because, merely, of apparent hardship in the icular instance. Departure from that would turn judi- administration into the uncertain field of mere arbitra-

may be that *Teeter v. United L. Ins. Asso., supra,* is in the principle of waiver above indicated. Certain it at the learned court in pronouncing judgment thought The opinion of the court here is that the case goes a too far and yet has some distinguishing characteristics the one in hand, tending to locate the latter outside the ciple under discussion if the former is within it. In the there was good ground on the company's part for claim- a forfeiture, as the assured must have known, while here assured had no good reason to think respondent's position tenable. In the New York case the assured may well supposed, the mere shadowy chance he had for main- ing that his policy was in force notwithstanding the ned default, was of too little consequence to warrant in- ng upon it, while here the facts are so plainly conclusive avor of the position that no lapse had in fact occurred, it seems the assured could not have intended to waive certainty for the uncertain outcome of an application for statement, but rather thought he might well avoid a blesome controversy with respondent by going through form of complying with its demand without prejudice to rights, even if the application for reinstatement should be ied, since no pecuniary penalty was involved, as seems to been the case. Moreover the letter of the assured ac- panying the application for reinstatement, shows upon face that he recited in such application that the policy

had lapsed, using the printed form supplied by respondei because the latter had so stated in its communication to hi in such a way as to lead to the belief that by the terms of t agency contract he had no right to deduct from the quarte payment but one fourth of the agency apportionment. I said in such letter:

"I am very sorry to cause you all this trouble but I mu have misunderstood my contract. I understood from r policy that I can pay my premiums quarterly if I wish t rate to be $41.35. My contract states that my commissio are payable within thirty days of the anniversary of the da of the policy." (Meaning evidently contract.) "I deduct the total amount ($14.60) after reading this."

Thus the application for reinstatement was made, supp ing, as respondent well knew from its attitude, that he h misunderstood the contract. Its letter inferentially stat that the agency apportionment for any year, by the contra was so payable as to render the whole or only a quarter a plicable upon a single premium payment, according as t assured should decide to pay annually or quarterly, whi was not the case. This rather rebuts the idea of acquiescen and intention to waive with knowledge, actual or constru tive, of the facts.

Without further discussion of the question of waiver, it the opinion of the court that the law on that subject is favor of appellant. Such being the case, all questions as reinstatement of the policy, which were resolved in respon ent's favor by court and jury, resulting in the judgment co plained of, are immaterial. That leads to the result th on the undisputed evidence, judgment should have been giv for plaintiff as demanded in the complaint upon the moti which was in effect made therefor notwithstanding the v dict, and the case must now take the course which it oug to have taken.

By the Court.—The judgment is reversed, and the cau remanded with directions to render judgment in accordan with this opinion.

DOHERTY, Respondent, vs. WING, Appellant.

September 14—October 5, 1909.

Fraud: Pleading: Collateral security: Banks.

complaint alleges that plaintiff agreed to transfer a note and mortgage to a bank as collateral security for loans, that defendant, the cashier of the bank, by fraudulent statements that it was an assignment as collateral security only, obtained from plaintiff an assignment in form absolutely transferring the note and mortgage to defendant, and that defendant refuses upon demand to surrender such securities; and in effect admits that the loans have not been repaid. *Held*, that no actionable fraud against plaintiff is shown, but simply that his note and mortgage are held by the defendant for the bank as collateral security; and until the loans are repaid defendant is entitled so to hold them.

APPEAL from an order of the circuit court for La Crosse nty: MARTIN L. LUECK, Judge. *Reversed.*

The complaint in this action alleges that the plaintiff was owner and holder of a note of the face value of $6,400, n which there was due and unpaid $4,960, and that the e was secured by a mortgage of equal value. August 20, 06, plaintiff went to the Batavian National Bank in the of La Crosse, of which the defendant is cashier, and se- ed a loan from the bank of $1,000. He gave the bank security for the payment of the loan an assignment of the e and mortgage. Subsequently he obtained $2,000 more m the bank upon the same security. Plaintiff alleges that defendant *Wing,* as cashier of the bank, stated that the ignment of the note and mortgage was solely and only for purpose of securing these loans, that it was an assignment collateral security and was not an absolute sale thereof, but t he signed an absolute conveyance of the note and mort- ge in favor of the defendant because he was deceived ough his false and fraudulent representations. After rning of said false and fraudulent representations of the

defendant, plaintiff demanded the return of the note a mortgage, but the defendant refuses to return them and alleged to have converted them to his own use. The co plaint alleges that the plaintiff through such fraudulent r resentations respecting the assignment of the note and mo gage has been defrauded by the defendant of the note a mortgage, and he demands judgment for the difference tween the value of the note and the mortgage and the su received by him from the bank. This is an appeal fr the order of the court overruling a general demurrer to complaint.

For the appellant there was a brief by *Higbee & Higb* and oral argument by *J. E. Higbee.* To the point tha pledgee cannot be held for a conversion of the pledge wi out a payment or tender of the indebtedness for which pledge is held, they cited *Lewis v. Mott,* 36 N. Y. 3 *Talty v. Freedman's S. & T. Co.* 93 U. S. 321, 326; Cool Torts (2d ed.) 531; Jones, Pledges, § 571.

For the respondent the cause was submitted on the br of *F. E. Withrow,* attorney, and *C. L. Hood,* of couns They cited *Meyer v. Doherty,* 133 Wis. 398; 20 Cyc. note 83 and cases cited; *Pryor v. Foster,* 130 N. Y. 1 *Gould v. Cayuga Co. Nat. Bank,* 99 N. Y. 333; *Hurlbert T. D. Kellogg L. & M. Co.* 115 Wis. 225; *Miller v. Ha barth,* 126 Wis. 50, 52; *Kruse v. Koelzer,* 124 Wis. 536, 5

SIEBECKER, J. The trial court held that the facts alleg constituted a cause of action against the defendant for fraud perpetrated upon the plaintiff. In determining the fect of the complaint the alleged facts must be separated fr the alleged conclusions inferable from such facts. The legations of fact are that the plaintiff applied to the ba for two loans of $1,000 and $2,000, respectively, and fered to secure repayment thereof by transferring note a mortgage as collateral; that the defendant, with whom

otiated these loans, was the cashier of the bank; that it agreed that the plaintiff was to transfer the note and tgage to the bank as collateral to secure these loans; that defendant wrongfully obtained from the plaintiff a writ- assignment which, in form, absolutely transfers the note mortgage to the defendant; and that the defendant re- s upon demand to surrender them to the plaintiff. In ct the plaintiff also admits that he has not repaid the ns. The plaintiff asserts that under these conditions he amaged because the defendant holds the note and mort- e under this written assignment.

t is evident that if the defendant holds the note and mort- e as collateral for the repayment of the amount of the ns he is entitled under this assignment to retain them l the loans are fully repaid. Plaintiff confesses that the ns remain unpaid. The full effect of the allegations of complaint is that the transfer of the note and mortgage he defendant by the plaintiff under the written assign- t operates to transfer them as collateral to secure the ment of the loans to the bank. The fact that the as- ment was taken in the name of the defendant, who is bank's cashier, in no way destroys it as security for the efit of the bank. The result is that the note and mort- e are held by the defendant for the bank as collateral to re the payment of the loans. Under these circumstances fraud has been committed against the plaintiff, and the endant is entitled to retain the security until the loans e been paid. The complaint does not state a cause of on.

y the Court.—The order overruling the demurrer is re- ed, and the cause remanded with directions to enter an r sustaining the demurrer, and for further proceedings rding to law.

BEKKEDAHL, Appellant, vs. VILLAGE OF WESTBY and other, Respondents.

September 14—October 5, 1909.

Villages: Street improvements: Powers of village board: Injuncti Pleading: Presumptions: Taking of private property.

1. In an action to restrain a village from making certain str improvements pursuant to petition, it will be presumed on murrer to the complaint, in the absence of allegations to contrary, that the village authorities are proceeding accord to law.
2. The general power in respect to streets and sidewalks confer upon the village board by subd. 11, sec. 893, Stats. (1898), cludes the power to determine the width of the traveled tr in a street.
3. Allegations in a complaint that a village board intends threatens to compel plaintiff to build a sidewalk outside of street and upon his residence lot, and that in order to do he will be deprived of his land without due process of and without compensation, do not show a right to an inju tion where it is evident from the facts pleaded that defenda do not intend to compel plaintiff to build a walk by force otherwise than by legal procedure regularly instituted carried on.

APPEAL from an order of the circuit court for Vern county: JAMES O'NEILL, Judge. *Affirmed.*

This is an appeal from an order sustaining a demurrer the plaintiff's complaint. The complaint alleges in eff that the plaintiff is, and has been for many years, the own of a certain lot used and occupied as his residence in the fendant village, and which abuts on La Crosse street, a that plaintiff has greatly improved the dwelling house up said premises, and that said property is of the value $10,000; that in front of said residence and just inside of t street line of said La Crosse street are two large shade tre furnishing shade to the dwelling house, and that there other and smaller trees, all standing within from two to

of the street line, and that the plaintiff's lot is about two higher than the grade of the street at that point; that in year 1901 the village board of defendant improved a portion of said street by macadamizing that part of said street ering the block lying next east of the block in which ntiff's dwelling house is situate, which improvement included the building of a stone curb and gutter on both sides aid street; that while the improvement was under consideration and on June 1, 1901, the village board by resolution fixed and determined the line of the curb for said street ight feet from the street line, and afterwards on June 21, 1, changed the distance to nine feet, and on said last-ied date fixed the line of the curb at nine feet from the et line; that pursuant thereto the curb on the north side La Crosse street was built nine feet from the north line of street and still remains there, and that no action has taken by the village board of defendant changing or alng said curb line; that at the time of fixing said curb the officers of said village designated and caused to be ted monuments to mark the curb line on the north side aid street in the block lying directly west of the block so adamized, being the block in which plaintiff resides, and officers of defendant directed plaintiff to build a plank walk in front of and abutting his property, and so placed same that the outer edge or line thereof would correspond nd be in line with the stone curb so fixed and built in the adjoining block, and that plaintiff in good faith conected in front of his property a plank sidewalk five feet e, and placed the outer edge thereof on the curb line so gnated, which sidewalk has remained and has been conously used for public travel until on or about the 12th of October, 1908.

The complaint then alleges that on the 23d day of June, 8, the village board of defendant, acting upon a petition he property owners along said street, decided to macadam-

ize that portion of said La Crosse street lying west of t
block macadamized as before stated, extending from Ma
street, in defendant village, to a point opposite the west e
of plaintiff's property, a distance of about nine and one-ha
rods, and on the 25th day of August, 1908, at a session
the village board, defendant awarded the contract of buil
ing a cement curb and gutter along both sides of said stre
to the defendant *Olson,* who has entered upon said work a
has proceeded to construct said curb and gutter; that on t
12th day of October, 1908, the defendant *Olson,* acting,
plaintiff is informed and believes, under the verbal instru
tion of some of the individual members of the village boa
of defendant, entered upon the premises of plaintiff and d
stroyed and removed the plank sidewalk, and threatened a
still threatens and intends to build and construct the ceme
curb and gutter about six feet inside of and north of the cu
line designated in 1901 by the village board, so that all th
portion of the roadway lying south of the stone curb, inclu
ing the space occupied by plaintiff's plank sidewalk, will
macadamized and thrown into the street for team travel, a
plaintiff will be deprived of the use thereof for sidewalk a
boulevard purposes. It is alleged, on information and b
lief, that the village board threaten and intend to comp
plaintiff to build a six-foot cement sidewalk north of sa
curb and place the same inside and north of the present a
true street line and upon his residence lot, and that in ord
to so build the same plaintiff will be deprived, without du
process of law and without compensation, of a strip of lan
six feet wide and about 100 feet long; that if the prese
sidewalk space is appropriated by the public for team trav
and the curb and gutter built on the line threatened, it wi
result in great and irreparable damage to plaintiff and
ruinous to his property in the manner in which it has bee
enjoyed and will permanently impair its future enjoyment
that the taking of said property will compel plaintiff to e

ate the terraced portion of his front dooryard a depth of ut two feet and six feet wide and will necessitate the bbing out of the shade trees in front of his property, and such damages cannot be adequately measured in an ac- at law; that plaintiff verily believes that the action of defendant *Olson* is through the order and direction of the tees of defendant acting individually, and that the same rbitrary, oppressive, and without authority of law; that street was opened of the width of three rods upwards of years ago, and has since been traveled such width, and the distance between the true curb lines on either side aid street is upwards of fifty feet, which is entirely ade- te for public team travel; that, unless enjoined, plaintiff s defendants will carry out their threatened acts and d said curb on his land and thereby appropriate the strip esaid.

he prayer is that the defendant village and its officers the defendant *Olson* and his servants be restrained and oined from building a street curb and gutter further north said street than the line of the present stone curb on the h side of said street, or from interfering in any way with strip of land five feet wide lying in front of and imme- ely abutting plaintiff's premises, and for general relief.

he defendants demurred to the complaint for want of s sufficient to constitute a cause of action, which demurrer sustained.

he cause was submitted for the appellant on the brief of *W. Graves,* and for the respondents on a brief signed by *rence Grimsrud* and *W. F. & A. C. Wolfe.*

ERWIN, J. The substance of the complaint is set out in statement of facts. The principal charge is that defend- are about to interfere with a part of a public street and the village board is acting under a petition in so doing. re are no allegations in the complaint going to show that

all the steps required by law were not taken in the proce
ing to make the improvement. The village having the ri
to improve the street, and it proceeding on petition to do
it must be presumed that it is acting lawfully in the abse
of any allegation to the contrary. Subd. 11, sec. 893, Sta
(1898), authorizes villages "to lay out, open, change, wid
or extend roads, streets, lanes, alleys, . . . and to grade, i
prove, repair or discontinue the same or any part there
. . . to make, alter, widen or otherwise improve, keep
repair, vacate or discontinue sidewalks and crosswalks
provided in this act." And sec. 905 provides the mode of p
cedure. There is nothing in the complaint showing or te
ing to show that these statutory provisions have been viola
or that the defendants are not proceeding in accordance w
them. The acts to be done under the contract with defe
ant *Olson* are to be done within the limits of the street. T
general power conferred by law on the village includes
power to determine the width of the traveled track. Ellio
Roads & S. § 451; *State v. Morristown,* 33 N. J. Law, 5
Benson v. Waukesha, 74 Wis. 31, 41 N. W. 1017; *McC
lough v. Campbellsport,* 123 Wis. 334, 101 N. W. 709; *Da
koehler v. Milwaukee,* 124 Wis. 144, 101 N. W. 706.

Stress is placed upon the allegations of the complaint
the effect that the village board "intend to, and threaten
at once after the completion of said curb and gutter, dir
and compel plaintiff to build a six-foot cement sidewalk no
of said curb and compel him to place the same inside of a
north of the present and true street line and upon his re
dence lot, and that in order to so build the same plaintiff w
be deprived, without due process of law and without comp
sation, of a strip of land six feet wide and about 100 f
long." The plain inference from the pleading is that if
plaintiff is compelled to build the walk it will be under le
procedure regularly instituted and carried on. He can
be compelled to build otherwise, and there is no allegat

defendants intend to forcibly or otherwise build or en-
upon his premises against his will. The allegation to
effect that, in order to build, the plaintiff will be deprived
is property without compensation and without due pro-
of law, is without force, because it is plain from the
pleaded that plaintiff cannot be compelled to build and
nit to a taking of his property without compensation, and
defendants do not intend forcibly to interfere.

ut it seems wholly unnecessary to discuss the question.
complaint is barren of facts sufficient to entitle the
ntiff to equitable relief, and therefore the demurrer was
erly sustained.

y the Court.—The order appealed from is affirmed.

ES, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

September 14—October 5, 1909.

roads: Injury to passenger: Unsafe baggage room: "Question of engineering:" Duty of carrier: Questions for jury: Contributory negligence: Evidence: Credibility: Special verdict: Questions not submitted: Waiver: Decision by court: Appeal: Reversal: Prejudicial error.

The rule that, generally, a master has the right to construct and maintain his property and appliances in his own way, and if there is no latent or hidden danger a servant assumes the risk of injury from the obvious character of such appliances, has no application as between carrier and passenger.

The expression "a question of engineering," meaning a question of judgment in the construction of a building or appliance, relates to a condition of fact pertinent in cases between master and servant, and not to any rule of law by which a court or jury is disabled from deciding a cause merely because the decision may involve such a question.

As to a passenger who was injured while in a railway baggage room at the invitation of the baggage master for the purpose of identifying her baggage, it was the duty of the railway company to have such room reasonably safe.

4. In an action for injuries to such a passenger, who accident stepped between the edge of a baggage truck and the edg a pit in which the truck stood with its platform on a level the floor, the question whether the baggage room, with unguarded pit extending nearly across it, constructed to fa tate the loading and unloading of baggage, was reasonably for the use of passengers claiming or identifying baggage th in, is *held* to have been a question for the jury.
5. The court properly refused in such action to submit for spe verdict the question, "Could it have been reasonably an pated that the accident in question would have occurred at time and place in question?" The inquiry should have b whether defendant could reasonably have anticipated that injury might probably result to a passenger by reason of construction and maintenance of this baggage room used it was.
6. Plaintiff's testimony in such case that she did not see the pi *held* not so manifestly impossible and untrue as to warr holding as matter of law that she was guilty of contribut negligence.
7. It requires an extraordinary case to authorize the court to t sworn testimony as manifestly impossible and untrue.
8. The jury having found by special verdict that the baggage r was not reasonably safe, that this was the proximate caus the injury, and that there was no contributory negligence the part of the plaintiff, whether or not a further express ing that defendant was negligent was necessary to fix its bility is not determined.
9. Under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), defendant, ing failed to request that the question of its negligence be mitted to the jury, waived the right to have the jury thereon; and, there being evidence to support a finding of n negligence, it must be presumed that the court in render judgment for plaintiff determined the question adversely to fendant.
10. How far sec. 3072*m*, Stats. (Laws of 1909, ch. 192),—provid among other things that no judgment shall be reversed un it shall appear that the error complained of has affected substantial rights of the party seeking reversal,—changes rules adopted and acted upon by this court long before passage of that act, and how far, if at all, it extends the visions of sec. 2829, Stats. (1898), not determined.

APPEAL from a judgment of the circuit court for Ver county: J. J. FRUIT, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on a brief

W. Graves and *Chas. E. Vroman* and a separate brief by *W. Graves*. They cited, among other cases, *Twitchell v. T. R. Co.* 39 Fed. 419; *Bandekow v. C., B. & Q. R. Co.* Wis. 341, 117 N. W. 812; *Groth v. Thomann,* 110 Wis. 86 N. W. 178; *Hill v. Fond du Lac,* 56 Wis. 242, 14 W. 25; *Kelley v. C., M. & St. P. R. Co.* 53 Wis. 74, 9 W. 816; *Sherman v. Menominee R. L. Co.* 77 Wis. 14, 45 W. 1079; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147, N. W. 891; *Block v. Milwaukee St. R. Co.* 89 Wis. 371, N. W. 1101; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 115 N. W. 865; *Jones v. C. & N. W. R. Co.* 49 Wis. 5 N. W. 854; *Bourda v. Jones,* 110 Wis. 52, 85 N. W. ; *Peat v. C., M. & St. P. R. Co.* 128 Wis. 86, 107 N. W. ; *O'Brien v. C., St. P., M. & O. R. Co.* 102 Wis. 628, 78 W. 1084; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, N. W. 24; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 W. 563; 6 Thomp. Comm. on Neg. § 7635; *Atkinson v. drich T. Co.* 60 Wis. 141, 18 N. W. 764.

or the respondent the cause was submitted on the brief . O. *Mahoney* and *J. Henry Bennett.* Among other au- ities, they cited *Ill. Cent. R. Co. v. Griffin,* 80 Fed. 278, C. C. A. 413; *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 W. 191; *Bennett v. L. & N. R. Co.* 102 U. S. 577; *Barow- . Schulz,* 112 Wis. 415, 88 N. W. 236; 3 Thomp. Comm. leg. §§ 2678, 2709, 2710; *Bremer v. Pleiss,* 121 Wis. 61, N. W. 945; 1 Thomp. Comm. on Neg. § 993; *Banderob is. Cent. R. Co.* 133 Wis. 249, 113 N. W. 738; 26 Am. ng. Eney. of Law (2d ed.) 512; *Hartwig v. C. & N. W. o.* 49 Wis. 358, 5 N. W. 865; *Bloor v. Delafield,* 69 Wis. 34 N. W. 115; *Garske v. Ridgeville,* 123 Wis. 503, 102 W. 22; *Morey v. Lake Superior T. & T. Co.* 125 Wis. 103 N. W. 271; *Howard v. Beldenville L. Co.* 129 Wis. 108 N. W. 48.

MLIN, J. Upon a special verdict finding that the plaint- hen injured was in the baggage room of the defendant

at the invitation of the baggage master, and that this bagga room was not then reasonably safe for the use of passenge invited thereto to identify their baggage, and that this con tion of the baggage room was the proximate cause of plai iff's injury, and that there was no want of ordinary care plaintiff's part which contributed to such injury, the plai iff had judgment for the amount of damages found by t jury.

The appellant assigns several errors which fairly raise t question of the sufficiency of the evidence to support the v dict; of the sufficiency of the verdict to support the jud ment; and complains of failure to submit to the jury a qu tion proposed by defendant, also of error in instructions the jury. The facts in evidence show that the baggage roo of the respondent at La Crosse is so constructed that a d pression or pit extends from the double doors at the we side of the room eastward into the room about twenty-fo feet and nearly across the room. This is about two feet ni inches in depth and slightly wider than the baggage truc and it is used for running the baggage truck into the room that the platform of the truck will be practically on a lev with the floor of the room. This is an obvious convenien in loading baggage on the truck and transferring the load truck from the baggage room to the platform which is on t lower level. At both sides and at the end of this pit or d pression the floor of the baggage room is available for a used for the deposit of baggage.

The plaintiff was a passenger on defendant's road, a went into the baggage room at the suggestion of the defe ant's employees to identify her baggage and have the sa checked. She then had some conversation with the baggag man, and left for the purpose of purchasing a rope to tie one item of her baggage which was defectively fastene She then returned and engaged in conversation with the ba gage master while one of the assistants of the latter w

; up the baggage with this rope which she brought with She went with the baggage master across the baggage to identify her luggage. Near where she stood there a truck in the pit or depression, and she accidentally ed between the edge of the truck and the edge of the r depression, breaking her leg and sustaining injuries. had not noticed nor had her attention been called to the lepression, or truck up to this time. The testimony on art of the defendant differed materially from this, but oregoing is the version of the occurrence established by erdict.

on this state of facts the defendant denies the right of laintiff to recover damages because the construction of aggage room was "an engineering problem," and con- that its construction and maintenance was no breach ty to any one; that it was a customary and usual mode onstructing baggage rooms and handling baggage and sary to the easy and convenient operation of that branch e carrying business; and that therefore the jury was not anted in finding that the baggage room was not reason- safe. To maintain this contention the appellant cites *v. Harris,* 176 Pa. St. 484, 35 Atl. 222; *Tuttle v. D., & M. R. Co.* 122 U. S. 189, 7 Sup. Ct. 1166; *Chicago W. R. Co. v. Armstrong,* 62 Ill. App. 228; *St. Louis S. Co. v. Burns,* 97 Ill. App. 175; *Chicago & E. I. R. v. Driscoll,* 176 Ill. 330, 52 N. E. 921; *Titus v. Brad- B. & K. R. Co.* 136 Pa. St. 618, 20 Atl. 517; *Bethle- I. Co. v. Weiss,* 100 Fed. 45, 40 C. C. A. 270, and other of that class. These cases all involved questions aris- etween master and servant.

enerally speaking, and without reference to special stat- or exceptional rules, the law confers upon the master ight to construct and maintain his own property and iances in his own way and according to his own judg- , and so long as there is no latent or hidden danger in

such construction or maintenance the servant accepting e
ployment from the master does so subject to this right of t
master, and assumes the risk of injury from the open and c
vious character of such appliances. Consequently in su
cases, where the defect causing the injury presents a me
question of this kind, courts have sometimes designated
as a mere "question of engineering," meaning a question
judgment in the construction of the appliance. There is
legal rule or doctrine by force of which a court or jury is d
abled from deciding a cause merely because in such decisi
there may be involved "a question of engineering." The e
pression relates to a condition of fact pertinent in cases l
tween master and servant and not to a rule of law. The ru
above stated obtaining between master and servant and
lied upon by appellant has no application between carri
and passenger, which was the relation of the parties in t
instant case. As to the respondent it was the duty of app
lant to have its baggage room reasonably safe. *Inderma*
v. Dames, 19 Eng. Rul. Cas. 64; *Ill. Cent. R. Co. v. Griffi*
80 Fed. 278; *Banderob v. Wis. Cent. R. Co.* 133 Wis. 24
113 N. W. 738. Whether or not the appellant perform
this duty may be a question of law or a question of fact, a
the inquiry in the instant case is whether there was sufficie
evidence to go to the jury on this point. It is the duty of
carrier to provide reasonably safe depot buildings in whi
freight and property transported over its road might be
curely stored; and facts showing the character and location
the depot building, the materials out of which it was bui
and its liability to take fire are proper to be laid before t
jury for the purpose of showing that the building was not re
sonably safe. *Whitney v. C. & N. W. R. Co.* 27 Wis. 32
See, also, *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 24
250, 70 N. W. 486. While it is the duty of the railroad co
pany to have its depot open and lighted for the convenience
passengers (*Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105,

W. 24), it is a question for the jury whether under the cir-
stances of the particular case the railroad company was
ligent in failing to have such lights. *Patten v. C. & N. W.*
Co. 32 Wis. 524. Whether a railroad company provided a
cient platform to enable passengers to descend from the
without danger was said to be a question for the jury in
matyr v. M. & P. du C. R. Co. 24 Wis. 578; and a like
ng was made in *McDermott v. C. & N. W. R. Co.* 82 Wis.
52 N. W. 85, where several cases are cited; and see
derob v. Wis. Cent. R. Co. 133 Wis. 249, 113 N. W. 738.
ether the baggage room constructed as described was rea-
ably safe for the use of passengers claiming or identify-
baggage therein was in the case at bar, we think a ques-
for the jury, notwithstanding the particular defect which
dered it unsafe inhered in a plan of the room deliberately
pted and used at La Crosse and elsewhere by the appel-
. Not that the jury may at its will condemn any plan
building as not reasonably safe, but facts and circum-
ces may be laid before them tending to show that the
ding is dangerous for the use to which it is put by the
ier, and it is for the court to say whether the evidence
any such tendency, and for the jury to pass upon its
ght and sufficiency. No doubt, if the baggage room so
tructed was only for the purpose of transferring bag-
to and from outgoing and incoming trains with the truck
ribed, there would be no evidence of its insufficiency for
purpose, but when it is also used as a place for passen-
to enter and walk about in for the purpose of identifying
gage at all hours and under all conceivable conditions of
estion of baggage, it may well be found to have been so
tructed as to be dangerous to those passengers so using
The finding of the jury covers both construction and
ntenance, and the maintenance of this unguarded open-
in a baggage room used for such purposes might well,
n the evidence before the jury, be found to constitute a

failure to maintain the baggage room in a reasonably safe
dition. It is not necessary to this to say that a barrier or
ing around the pit or opening would destroy or impair its
ciency for the purpose of loading or unloading and remov
baggage. For such purposes the baggage room was rea
ably safe. It is only when the additional use by passeng
for the purpose of identification is added that the room
be said not to have been reasonably safe for such additio
use. Criticisms upon the instructions to the jury beca
such instructions permit the jury to consider whether or
the appellant was negligent in constructing and maintain
the pit in question are disposed of by these considerations

The appellant requested the court to submit to the j
the following question as part of the special verdict: "Co
it have been reasonably anticipated that the accident in q
tion would have occurred at the time and place in questio
The court properly refused to submit this question. Its
gation would have determined nothing. The mere fact
the appellant could not have reasonably anticipated the
cific accident at the particular time and place is not sig
cant. The inquiry should have been whether the appel
could have reasonably anticipated that an injury might p
ably result to a passenger by reason of the construction
maintenance of this baggage room used as it was. *Cool*
v. Hallauer, 126 Wis. 244, 105 N. W. 568. It is not ne
sary to decide whether this refusal would have been erro
the question was properly drawn.

On the question of contributory negligence it is
tended that the respondent must have seen and ought th
fore to have avoided this pit or depression, and that her
timony to the effect that she did not see it is manifestly
possible and untrue. It requires an extraordinary
to authorize the court to so dispose of sworn testim
Whether the respondent saw the pit or not would depend
the amount and location of the baggage in the room, whe
there was or was not a truck in the pit, how she reached

gage, what were her habits and opportunities of observa- in many particulars, and we cannot say that her tes- ony on this point is impossible. Its weight and credi- y were for the jury. The burden of proof upon this t was upon the appellant.

he jury found by special verdict that the baggage room not reasonably safe for the use of passengers who were ted therein for the purpose of identifying and having gage checked, and that this was the proximate cause of ondent's injury, and that there was no contributory neg- nce on the part of the respondent, but did not expressly defendant negligent or find defendant negligent further may be implied from the above findings. The appellant not request that this question of defendant's negligence be nitted to the jury. It is not necessary in this case for the rt to determine whether or not an express finding of negli- ce was necessary in addition to the facts above found in or- to fix the liability of the appellant, because, if such find- was necessary to uphold a recovery, it must be presumed the appellant, by its failure to request its submission to jury, waived appellant's right to the determination of that stion by the jury, and also that that question was deter- ed adversely to the appellant by the judgment appealed n, because, as we have seen, there is evidence to support a finding. Ch. 346, Laws of 1907, being sec. 2858*m*, ts., changes the rule which formerly prevailed, and it is incumbent upon attorneys to present to the trial court ly and openly requests for the submission of questions of in a special verdict. If by inadvertence or finesse they to do so, being present and having opportunity, they there- waive the right to have the jury pass upon that particular of fact, and the court rendering its judgment adversely hem (if the court does so render judgment) necessarily lves that fact against them.

Respondent's counsel cites ch. 192, Laws of 1909 (sec. 2*m*, Stats.), to us for the purpose of showing that the

judgment in his favor should not be reversed or set aside
cept as therein provided. The statute is as follows:

"No judgment shall be reversed or set aside or new t
granted in any action or proceeding, civil or criminal, on
ground of misdirection of the jury, or the improper adr
sion of evidence, or for error as to any matter of pleading
procedure, unless in the opinion of the court to which
application is made, after an examination of the entire
tion or proceeding, it shall appear that the error complai
of has affected the substantial rights of the party seeking
reverse or set aside the judgment, or to secure the new tri

It is not quite clear what change this act makes in the r
adopted and acted upon by this court long prior to the
sage of the act. See *Franke v. Mann,* 106 Wis. 118,
N. W. 1014, and *Mauch v. Hartford,* 112 Wis. 40, 87 N.
816.

The cases applying and announcing those rules are
numerous to be cited. Eighty instances of this kind will
found cited and referred to under the title "Appeals and
rors," subtitle XI, "Harmless and Immaterial Error,"
mulative Index Digest for September, 1908, which mer
covers the work of this court from 122 Wis. to 133 Wis.
115 N. W. Rep., inclusive. Whether this act of 19
changes the rule stated in *Dresser v. Lemma,* 122 Wis. 3
100 N. W. 844, to the effect that, if error is committed, p
udice is presumed to flow therefrom, and whether that r
so stated is consistent with *Franke v. Mann,* 106 Wis. 1
81 N. W. 1014, which declares that not only error but pr
dicial error must be made to appear affirmatively, or
sistent with other decisions of this court, and how far, i
all, the act of 1909 extends the existing provisions of
2829, Stats. (1898), has not been discussed by counsel,
we reserve the decision of these questions for some case
which they are necessarily involved and thoroughly p
sented.

By the Court.—The judgment of the circuit court is
firmed.

RE SOUTHERN WISCONSIN POWER COMPANY: APPEAL OF BLACK HAWK LAND COMPANY.

September 14—October 5, 1909.

Constitutional law: Statutes: Private and local acts: Sufficiency of title: Location of dam authorized to be built: Granting corporate powers: Special act: Franchises not corporate: Assignment to corporation: Statute construed: Purposes for which corporations may be formed: Dams on navigable rivers: Legislative grant: Who may question: Public purposes: Eminent domain: Circuit judges: Holding court for one another: Orders at chambers.

The title of a private or local act should be liberally construed, and the act should not be declared void under sec. 18, art. IV, Const., merely because such title does not express the subject as fully or as unequivocally as possible.

A private or local act should not be held invalid because of insufficiency of its title unless, giving such title the largest scope which reason will permit, something is found in the body of the act which is neither within the literal meaning nor the spirit of the title nor germane thereto.

The title to ch. 462, Laws of 1901, is "An act to authorize [certain persons named] to build and maintain a dam across and to improve the navigation of the Wisconsin river," etc., the particular place where the dam is to be built not being specified. *Held* that, assuming the act to be local rather than private, the subject of the act is sufficiently localized in its title to meet the requirements of sec. 18, art. IV, Const. *Durkee v. Janesville*, 26 Wis. 697; *Anderton v. Milwaukee*, 82 Wis. 279; and *Milwaukee Co. v. Isenring*, 109 Wis. 9, distinguished.

A franchise granted by the legislature to construct and maintain a dam across a river is not a corporate power or privilege within the meaning of sec. 31, art. IV, Const., prohibiting the legislature from enacting any special or private law granting corporate powers or privileges except to cities. Especially is this so where the act granting such a franchise (in this case ch. 462, Laws of 1901) specifically provides that no corporate powers are granted or intended to be granted by it.

A franchise, such as the right to build a dam across a river, which is not a corporate franchise may be conferred by a special or private law upon a corporation already existing. *Stevens*

Point B. Co. v. Reilly, 44 Wis. 295, so far as it holds to the
trary, overruled.

6. The franchise to build a dam across the Wisconsin river gra
by ch. 462, Laws of 1901, being expressly made assignabl
corporation organized for the purpose under ch. 86, St
(1898), had the right, under sec. 1775*a*, to take an assignm
of such franchise.

7. Under sec. 1775*a*, Stats. (1898), the acquirement and use
such a franchise is a lawful business or purpose, for wh
under sec. 1771, a corporation may be organized.

8. The provision in sec. 4, ch. 462, Laws of 1901, that no corpo
powers are granted or intended to be granted by that act,
not prohibit a corporation otherwise created from acqui
and exercising the rights and franchises granted by said ac

9. A statute authorizing individuals "to build and maintain a
across and to improve the navigation of the Wisconsin r
above the same and for the purpose of creating hydra
power" is not in violation of sec. 1, art. IX, Const. (provi
that the navigable waters leading into the Mississippi "s
be common highways and forever free," etc.), and in the
sence of legislation on the subject by Congress is within
plenary power of the legislature.

10. When the legislature has granted such authority, and the s
does not question that the improvement made is in conform
with the power delegated, neither the necessity nor the
fulness of the improvement, nor the manner in which i
made, can be called in question by private parties, even th
whose land is sought to be condemned in aid of the impr
ment.

11. Whether the particular use for which property is sought t
taken by right of eminent domain is public or private is a q
tion the ultimate decision of which rests with the courts;
this does not preclude the courts from according proper de
ence to legislative declarations as to what constitutes a pu
purpose.

12. Where the legislature authorizes the building of a dam ac
a river to improve the navigation thereof and also for the
pose of creating hydraulic power, either of such purpose
a public one, so that the power of eminent domain may
legally conferred upon the owners of the franchise.

13. The provision in sec. 11, art. VII, Const., that "the judges of
circuit court may hold courts for each other," should be li
ally construed, the authority so conferred being intended
include generally the judicial business which a circuit ju
is authorized by law to transact. One circuit judge may, th

fore, in a proper case make orders at chambers in another circuit.

Even if the provision above quoted expressly authorizes a circuit judge to hold court only at a regular term outside of his circuit, it does not preclude the legislature from conferring larger powers, as has been done in sec. 2432, Stats. (1898).

PPEAL from an order of the circuit court for Juneau ty: JAMES O'NEILL, Judge. *Affirmed.*

his is an appeal from an order of the circuit court for eau county denying the motion of the *Black Hawk Land pany* to vacate and set aside an order appointing commioners of appraisal in condemnation proceedings.

h. 462, Laws of 1901, was entitled "An act to authorize iam Gunther, A. D. Johnson and A. B. Whitman, their each of their heirs, executors, administrators and assigns uild and maintain a dam across and to improve the navion of the Wisconsin river above the same, and for the ose of creating hydraulic power." Sec. 1 of the act prod for the location of the dam and its height. Sec. 2 prod that in case it should be necessary to take, flow, or re any lands for the purpose of constructing the dam orized or for the purpose of improvement, the grantees ed in the franchise should be subject to all the provisions, edies, and liabilities contained in ch. 146, Stats. (1898), tled "Of Mills and Milldams." Sec. 3 of the act prod that for the purpose of acquiring the necessary lands flowage purposes, said parties, their heirs and assigns, nt enjoy the rights granted to and conferred upon corations by secs. 1850 to 1857, inclusive, of the Statutes of 3 and of amendments thereto. Sec. 4 of the act prod that no corporate powers were granted or intended to ranted by it, and that the same should not be construed eemed to grant corporate powers.

he *Southern Wisconsin Power Company,* the petitioner in, is a corporation organized under the provisions of

ch. 86, Stats. (1898). The rights and franchises confe
by ch. 462, Laws of 1901, were in form assigned to said
poration after its organization and before it attempted
institute condemnation proceedings. In its application
the appointment of commissioners to appraise land for fl
age purposes it set forth the fact of its incorporation and
the assignment of the aforesaid franchise, and also aver
that it was proceeding with the construction of the dam
thorized by the act in question, and that it was necessary
overflow certain described lands in order to carry out the
jects and purposes of such act, and that it was unable
agree with certain landowners for the purchase, lease, or
of such lands or for such easement therein as was necessa
or upon the amount of compensation that should be paid
the taking of such property.

The *Black Hawk Land Company* is the owner of cert
lands sought to be condemned by the petitioner, and in
posed an answer to such petition setting forth its reasons
its lands should not be appropriated by the petitioner,
moved for an order vacating the order appointing comm
sioners in the condemnation proceedings. The court refu
to set aside such order, and from the order denying the
tion to vacate this appeal is taken.

For the appellant there were briefs by *Cary, Upham*
Black, and oral argument by *Alfred L. Cary.*

For the respondent there was a brief by *Jones & Sc*
bring, and oral argument by *B. W. Jones.*

BARNES, J. The appellant contends (1) that ch. 4
Laws of 1901, violates sec. 18, art. IV, of the constitut
of Wisconsin because the subject of the act is not expres
in the title; (2) that the act of 1901 violates sec. 31, art.
of our constitution in that it grants corporate powers
privileges; (3) that the rights conferred by the act in q
tion could not lawfully be assigned to or be exercised b

rporation because of the restriction contained in its fourth
tion; (4) that the act is a violation of sec. 1, art. IX, of
Wisconsin constitution; (5) that the dam in question,
ile purporting to be in aid of navigation, is in reality de-
uctive of it, and constitutes an unlawful structure in a
vigable stream; (6) that the respondent is seeking to con-
nn lands for a private purpose; (7) that the order ap-
inting commissioners was made by a judge who had no
ht or jurisdiction to make the same.

1. The title to ch. 462, Laws of 1901, authorizes certain
rsons therein named to build a dam across the Wisconsin
er, without specifying the particular place where the dam
o be built. It is urged that the act is local, and that the
e to such an act is defective and insufficient unless it re-
s to the specific place over which the law is to operate, and
t such place is not sufficiently localized in the act in ques-
n to meet the requirements of sec. 18, art. IV, of our con-
ution. In support of such contention the following cases
this court are cited. *Durkee v. Janesville,* 26 Wis. 697;
derton v. Milwaukee, 82 Wis. 279, 52 N. W. 95; and *Mil-
ukee Co. v. Isenring,* 109 Wis. 9, 85 N W. 131.

In *Durkee v. Janesville* and in *Milwaukee Co. v. Isenring*
object sought to be accomplished by the constitutional pro-
ion under consideration is pointed out. In the latter case
s said that the framers of the constitution

tended to guard against the danger of legislation, affect-
private or local interests, being smuggled through the
slature under misleading titles, by requiring every bill
cting such interests to be under a title likely to call at-
tion of the lawmakers to its character, and likewise the
ntion of the people affected, to the end that every mem-
of the legislature may intelligently participate in consid-
ng such bill and all objections thereto may be presented."

Substantially the same idea is expressed in *Durkee v.
esville.* In the latter case it is also said: "The subject of

a local act cannot be expressed in the title without a referen to the place over which it is to operate being made therein This language is impliedly approved in the *Isenring Ca* and in at least one other case to which reference will be her after made. The titles to the acts before the court in t two cases under consideration, and which were condemne made no attempt at localization. A reading of such titl would convey the belief that the acts were general, applyi to the entire state. There was absolutely nothing in them even suggest that the proposed laws should have any r stricted or local application. Yet the purpose of the act i volved in the *Janesville Case* was to legalize certain acts the common council of that city, and the acts construed in t *Isenring Case* related only to the fees of the sheriff of M waukee county.

In *Anderton v. Milwaukee, supra,* the act involved w held void as being in violation of sec. 1 of the XIVth amen ment to the federal constitution. The court also said th the act was local and related to a subject not expressed in title, and hence violated sec. 18, art. IV, of the constituti of Wisconsin. On what ground this part of the decision w placed is not apparent. The act was entitled "An act to a thorize the city of Milwaukee to change the grade of streets [Ch. 254, Laws of 1891.] The body of the act referred a certain limited district in the city of Milwaukee, and a pellant contends that it was held void because the particul district affected was not set forth in the title. If such w the view of the court, this case goes to a greater extreme th any other that has been called to our attention in requiri the title to a local act to designate the exact locality to be fected, and comes nearest to being authority in point upon t proposition to which it is cited. An examination of the bri filed in that case shows that the principal ground of atta upon the law, as being a violation of sec. 18, art. IV, Cons was not because the title was not sufficiently localized.

s urged that, while the act purported to authorize the city change the grade of its streets, it in fact conferred no wer in this behalf that the city did not already possess; t under the existing laws owners of property abutting on eets were entitled to damages sustained by reason of a nge in grade, and that the act in question attempted to eal such laws as to about one fortieth of the street front- in the city, leaving them in full force as to the remainder, l that the title to the act was misleading, in that the body reof sought to accomplish another and an entirely different rpose from that expressed in the title. We think the mis- tement of the purpose of the law in its title constituted the stantial objections to its validity under sec. 18, art. IV, the constitution. But, assuming that the court decided t the title did not sufficiently localize the act, there is an portant distinction between the *Anderton Case* and the one are presently considering. A reading of the title to the there involved would lead the reader to believe that what- r was its purpose it affected the entire city of Milwaukee l not a very small fraction of it. A resident of the city ding such title would have no reason to believe that the lity in which he owned property was affected to any ater extent than any other locality in the city. On the er hand, ch. 462, Laws of 1901, authorized the building of a single dam. The title to the act informs every one that act authorizes the building of but one dam and that such n is to be located on the Wisconsin river. It misleads no , although it is not as definite as to location as it might be le.

An act of the legislature should not be adjudged invalid ept upon clear and unmistakable grounds, and the title of rivate or local act should be liberally construed, and the should not be declared void merely because such title does express the subject as fully or as unequivocally as pos- e. *Mills v. Charleton,* 29 Wis. 400. The title to an act

must be liberally construed, giving all reasonable leeway
the exercise of legislative discretion. It should not be h
insufficient if a reasonable doubt exists as to its sufficien
It is only where the title is so insufficient and so defective
not to reasonably suggest the purpose of the act it cove
and where a reading of the act will disclose provisions t
are clearly outside of its title, that it will be held inval
Milwaukee Co. v. Isenring, 109 Wis. 9, 24, 85 N. W. 1
The title to a legislative act must not only be liberally c
strued, but the act should not be condemned as insuffici
because of the title, unless, giving such title the largest sc
which reason will permit, something is found in the body
the act which is neither within the literal meaning nor
spirit of the title nor germane thereto.

"Courts cannot sit in judgment upon the work of the leg
lature and decide one of its acts unconstitutional, merely
cause the title thereof is not as comprehensive as it mi
have been made. Within all reasonable boundaries, leg
lative discretion in that field cannot be rightfully interfe
with." *Diana S. Club v. Lamoreux,* 114 Wis. 44, 48,
N. W. 880, 882.

In this case the following language of the New York co
of appeals in *People ex rel. Comm'rs v. Banks,* 67 N. Y. 5
572, is cited with approval:

'The constitution does not require the title of a priv
or local bill to disclose or shadow forth the character of
proposed legislation, its full scope and purpose, and to m
known the several interests which may be directly or in
rectly affected by it so as to attract attention and give not
of all that is to be accomplished by the proposed act. T
constitution requires the subject of the act to be expressed
the title, but leaves the mode of expressing it wholly to
discretion of the legislature.'

Passing from these general statements, indicating the
titude with which courts approach such a question as we h
before us, to specific instances where the sufficiency of

es to private and local laws was passed upon, we find that decisions in specific cases are, with great unanimity, in ire harmony with the general rules adverted to.

Ch. 299, P. & L. Laws of 1855, was entitled "An act to orporate the Sugar River Valley Railroad Company." ch. 38, P. & L. Laws of 1858, it was provided that the vileges granted by the act should cease at the expiration eight years from the passage of the act, unless the com- y should have constructed ten miles of its road. Ch. 273, & L. Laws of 1870, was entitled "An act to revive and end the act to incorporate the Sugar River Valley Rail- d, approved March 29, 1855, and to authorize certain ns therein named to aid in the construction of said rail- d." It will be observed that the towns to which the law to apply were not named in the title to the act, but it was l that the title sufficiently localized the act, and that it not subject to the objection that was held fatal in *Durkee anesville,* 26 Wis. 697. *Phillips v. Albany,* 28 Wis. 340.

Ch. 25, Laws of 1870, was entitled "An act to authorize ain counties, towns, cities and villages to aid the Milwau- & Northern Railway Company." It was contended that act was void because the subject thereof was not suffi- tly expressed in the title. The municipalities affected he act were not named in the title, and could be ascer- ed only by a reference to the body of the act. The court : "We do not think the provision in the constitution re- es any such particularity in the title, and it would cer- ly be very inconvenient to observe it in practical legis- on." *Lawson v. M. & N. R. Co.* 30 Wis. 597, 600.

Ch. 398, P. & L. Laws of 1868, was entitled "An act to nd ch. 170 of the Private Laws of 1857, entitled 'An act ncorporate the Yellow River Improvement Company,' ap- ved March 2, 1857." This act authorized the improve- t of a navigable stream and the building of dams thereon. court in construing it said that it "must, under the

decisions of this court, be held to be a local act, within meaning of the constitutional provision above referred Sec. 18, art. IV, Const. Counsel for appellant cite this cision in support of the proposition that ch. 462, Law 1901, is a local act. Nothing is said in the title to indi that the act confers power to construct dams at any part lar point on the Yellow river, nor in fact to construct dams at all, except as such power might be inferred from fact that a corporation is created, and yet the title to the was held to embrace the subjects embodied in it, among t the power to erect dams. *Yellow River Imp. Co. v. Arn* 46 Wis. 214, 49 N. W. 971. The court, while holding act local, said:

"The real question of any difficulty in this case is the discussed in *Mills v. Charleton, supra* [29 Wis. 400]; that is whether the title of the act is so specific and restri that it cannot be said to indicate any intention to confer rights upon the corporation, and therefore the subject is expressed therein."

Ch. 454, P. & L. Laws of 1867, was entitled "An ac incorporate the Mechanics' Union Manufacturing C pany." Said corporation was empowered, among o things,

"to construct and maintain all such dam or dams, cana canals, waterways, reservoirs, flumes and races as may necessary in the business operations of said company, may lease or sell any surplus water or water power cre by their said dam or dams; provided that said company s have no authority to build or erect the dam or dams her authorized except across Rock river, at or near Horicon the county of Dodge."

Still another provision of the act authorized the corpora "to keep and maintain the dam across Rock river now ere in the village of Horicon, in the county of Dodge, in case person or persons, body corporate or politic owning said shall convey their right, title and interest in and to the sa and the parcels of lands on which it abuts, to the comp hereby created."

This act was before this court and its constitutionality was
cked on the ground that it violated sec. 18, art. IV, of
constitution, and it was upheld in an elaborate opinion,
which the authorities on this subject in this and other
rts are reviewed. *Diana S. Club v. Lamoreux,* 114 Wis.
89 N. W. 880. It is true, it is said in the opinion in
t case that the act is private rather than local. This por-
n of the decision either overlooked or overruled the first
ted portion of *Yellow River Imp. Co. v. Arnold, supra.*
ese two acts legitimately fall under the same classification.
one is private the other is, and if one is local the other is.
h were acts creating corporations. Both authorized the
struction of dams. The Yellow river, being capable of
ting logs, was navigable in fact under a long line of de-
ons. *Whisler v. Wilkinson,* 22 Wis. 572; *Sellers v.*
ion L. Co. 39 Wis. 525; *Olson v. Merrill,* 42 Wis. 203;
C. Conn Co. v. Little Suamico L. Mfg. Co. 74 Wis. 652,
N. W. 660; *Falls Mfg. Co. v. Oconto R. Imp. Co.* 87 Wis.
, 58 N. W. 257; *Willow River Club v. Wade,* 100 Wis.
76 N. W. 273. The Rock river at Horicon was also a
igable stream. Sec. 1607, Stats. (1898); *In re Horicon*
Dist. 136 Wis. 227, 232, 116 N. W. 12. We fail to dis-
er any substantial ground for holding one of these acts
l and the other private and not local, and we think these
acts and ch. 462, Laws of 1901, fall within the same
egory in this regard. If one is local then the others are,
if one is private the same is true of the others; and it is
nificant that the titles involved in the cases of the *Yellow*
er Imp. Co. v. Arnold and *Diana S. Club v. Lamoreux*
much more general in their scope and character, and
ch more likely to mislead the legislature and the public as
he character of the legislation, than is the title to the act
ler consideration in the present case.

We fail to find any case where such a title as is here in-
ved has been condemned by this court. As has been said,

there are a number of cases where titles more ambiguous h
been upheld. The general language used in *Durkee v. Ja*
ville, 26 Wis. 697, that the title to a local act must refe
the place over which the law is to operate, must be constr
with reference to the facts in that particular case. The sa
general language is used in *Yellow River Imp. Co. v. Arn*
and yet the court there held that a title which simply autl
ized the incorporation of a company was broad enough to
able the legislature to confer on such company by the act
power to dam a navigable stream, because the power c
ferred was properly connected with or necessary or pertin
to the general objects expressed in the title.

We entertain no doubt that *Durkee v. Janesville, sup*
and *Milwaukee Co. v. Isenring,* 109 Wis. 9, 85 N. W. 1
were correctly decided. The titles involved in each of th
cases were such as conveyed the idea that the proposed l
were general and applicable to the entire state. There
nothing about the titles to suggest that the acts were eit
private or local, although one of the acts related to a sin
city and two of them related to a single county in the st
The law here involved is not localized in the title to the
tent it might be, but still it is localized. It expressly ne
tives the idea that it is of state-wide application, and infor
all persons who read it that the body of the act refers to so
specified point on the Wisconsin river. It is true that t
river passes through the entire length of our state and is
eral hundred miles long. But it is also true that there
comparatively few points thereon suitable for dams, so t
the wide scope of the title is more apparent than real.
think a substantial distinction between this case and the ca
relied on by appellant is this: A resident of Milwau
county reading the titles to the acts involved in the *Isenr*
Case, or a resident of Janesville reading the title to the
involved in the *Durkee Case,* would have no reason to s
pose that his domicile was affected by these acts to any grea

nt than any other portion of the state, while in the in-
t case the reader is advised that it is proposed to erect a
at some point on the Wisconsin river. If he were in-
sted in the subject he would naturally turn to the act it-
for further information. In the one case the title is
tively misleading; in the other it does not mislead at all.
not as specific as it might be made, but it is sufficiently
ific to put the reader on inquiry as to what the real na-
and character of the law is. The power conferred by
act to build a dam at a definite location is pertinent to
is properly connected with the general object expressed
ne title, which is the test adopted in the *Yellow River*
Co. Case.

n view of the deference that this court must pay to acts
ne legislature, and in view of the decided cases in this
t, we must hold that the title to the act in question does
run counter to the reasons given in *Durkee v. Janesville*
in *Milwaukee Co. v. Isenring* for the adoption of sec. 18,
IV, of our constitution, and that, assuming such act to
ocal rather than private, the subject of the act is suffi-
ly localized in its title to meet the constitutional require-
.

It is next urged that the respondent is claiming cor-
te powers and privileges granted by a special law, which
ohibited by sec. 31, art. IV, of the constitution. It is
ed in support of this contention that the legislature could
y special act create a corporation and confer such powers
it, or confer them directly upon a corporation organ-
under ch. 86, Stats. (1898), and that a corporation can-
be formed for a purpose not authorized by ch. 86, and
ot exercise powers or functions not therein provided for.
le the franchise here granted was a legislative grant, it
not a corporate power or privilege within the meaning
c. 31, art. IV, of the constitution. If such a franchise
granted to a corporation it would become its property,

but would not be essential to its corporate existence. clause prohibiting the granting of corporate powers or leges simply prohibits the grant of corporate charters by cial act. A franchise is not essentially corporate, and not the grant of a franchise that is prohibited by the stitution, but the grant of a corporate franchise. The of the franchise here granted by the corporation would destroy its corporate existence. *Linden L. Co. v. Milwa E. R. & L. Co.* 107 Wis. 493, 514, 83 N. W. 851; *Sta rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441 N. W. 697; *Black River Imp. Co. v. Holway,* 87 Wis. 59 N. W. 126; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, That the grantees of a franchise might lawfully convey same to a corporation organized under the general law decided in *Underwood L. Co. v. Pelican B. Co.* 76 Wis 82, 45 N. W. 18. Besides, this act specifically provides no corporate powers are granted or intended to be gra by it.

The *Linden L. Co. Case* definitely decided that a fran might be conferred on a corporation already created. If be true, then no good reason is apparent why a fran might not be assigned to such a corporation, assuming the scope of its articles of incorporation was such as to mit it to take the assignment. On the oral argument co conceded that their position is not well taken if the cour lows the decision in the *Linden L. Co. Case.* That case important, was well presented at the bar, and was well sidered by the court, and doubtless many valuable erty rights have been acquired on the strength of it, a should require a strong showing to now overturn it. decision does not appear to be in harmony with *St Point B. Co. v. Reilly,* 44 Wis. 295. This case is no ferred to in the opinion, but it appears from the state of the case that it was cited to the court, and it must be

dered as overruled in so far as it holds that a franchise nnot be granted to an existing corporation. We do not ink that the decision in the *Linden L. Co. Case* should now disturbed.

In reference to the assignability of the franchise, the law anting it provides that it may be assigned, and the general atute (sec. 1775*a*, Stats. 1898) authorizes corporations to ke by purchase or assignment the privileges or franchises anted to individuals either before or after that statute was ssed, so that we have a general law expressly authorizing rporations organized under ch. 86 to take an assignment of ch a franchise as was granted by ch. 462, Laws of 1901. ec. 1771, Stats. (1898), after enumerating the specific pur-ses for which corporations may be organized, provides gen-ally that they may be organized for any lawful business purpose. Sec. 1775*a*, Stats. (1898), has made the ac-iirement and use of a franchise such as is here involved a wful business or purpose, if it could be made lawful by atute law, and we think it could.

3. Sec. 4, ch. 462, Laws of 1901, provided that no corpo-te powers were granted or intended to be granted by the t, and that it should not be construed or deemed to grant ch powers. Appellant maintains that this section should construed as a prohibition against the acquirement or ex-cise, by a corporate entity, of the rights and franchises anted. We do not think so. Such is not the natural mean-g or import of the words used. Had the legislature in-nded to prevent a corporation from acquiring or exercising e rights and privileges granted, it would have been an easy atter to explicitly express such intent. It is not probable at it would have been left to courts to divine such purpose somewhat farfetched conjecture. It is more reasonable suppose that, through overcaution on the part of the per-ns drafting the bill or on the part of the legislature that

* In re Southern Wisconsin Power Co. 140 Wis. 245.

passed it, it was intended to forestall any possible atten
to claim that the act in fact created a corporation and gran
corporate privileges thereto.

4. It is next asserted that ch. 462, Laws of 1901, viola
sec. 1, art. IX, of our state constitution, which provides

"And the river Mississippi and the navigable waters le
ing into the Mississippi and St. Lawrence, and the carry
places between the same, shall be common highways and f
ever free, as well to the inhabitants of the state as to the c
zens of the United States, without any tax, impost or du
therefor."

It is urged that the act of 1901 authorized the construct
of a dam from bank to bank across the channel of a na
gable stream which discharges its waters into the Miss
sippi river, and that such dam is an obstruction in the ri
and prevents the free navigation thereof guaranteed by
constitution and by art. 4 of the Ordinance of 1787.

This objection to the law is answered by numerous de
sions of the supreme court of the United States. These
cisions establish the following propositions: (a) Under
commerce clause of the federal constitution the Congress
the United States has jurisdiction over all navigable wat
therein. (b) As to navigable streams entirely within
borders of a single state, such state has plenary power in
absence of Congressional action, but Congress is not c
cluded by anything that the state, or individuals by its
thority, may have done from assuming entire control o
such streams, and abating any erections that may have b
made and preventing others from being made. (c) In
absence of legislation by Congress on the subject, a statute
a state which authorizes the construction of a dam acros
navigable river wholly within such state is constitution
(d) There must be a direct statute of the United States
order to bring within the scope of its laws obstructions a
nuisances in a navigable stream wholly within a sta

) The clause in the constitution providing that the navi-
ble waters therein referred to "shall be common highways
d forever free," etc., does not refer to physical obstruc-
ns of these waters, but refers to political regulations which
uld hamper the freedom of commerce. *Willamette I. B.*
. v. Hatch, 125 U S. 1, 8 Sup. Ct. 811, *Pound v. Turck,*
U. S. 459; *Willson v. Black Bird Creek M. Co.* 2 Pet.
5; *Gilman v. Philadelphia,* 3 Wall. 713; *Monongahela*
av. Co v. U. S. 148 U. S. 312, 13 Sup. Ct. 622; *Mont-*
mery v. Portland, 190 U. S. 89, 23 Sup. Ct. 735. The
se of *Pound v. Turck, supra,* arose out of an act of the
isconsin legislature authorizing the construction of a dam
ross the Chippewa river, a navigable stream, and involved
e construction of sec. 1, art. IX, of our constitution.
This court has also held that it is within the power of the
islature of the state to authorize the construction of a dam
ross a navigable stream. *Wis. River Imp Co. v. Manson,*
Wis. 255; *Black River F. D. Asso. v. Ketchum,* 54 Wis.
3, 11 N. W. 551; *Black River Imp. Co. v. La Crosse B &*
Co. 54 Wis. 659, 11 N. W. 443; *J. S. Keator L. Co. v.*
Croix B. Corp. 72 Wis. 62, 38 N. W 529 The dam
re permitted to be erected is authorized in aid of naviga-
n, and the power of the legislature is plenary to empower
lividuals to construct dams in navigable streams of the
te for such a purpose. *Falls Mfg. Co. v. Oconto River*
p. Co. 87 Wis. 134, and cases cited on page 150, 58 N. W.
7, 261, *In re Dancy D. Dist.* 129 Wis. 129, 139, 108
W 202.

5. It is next urged that, while the act specifies that its pur-
se is to improve the navigation of the Wisconsin river above
dam, such dam is in fact an obstruction to navigation, ex-
ding as it does from bank to bank and being fifteen feet
height, that its real purpose is to create hydraulic power;
d that the navigation of the river cannot be obstructed for
y such purpose. It has been held that the legislature is

at least primarily the judge of the necessity for the propos improvement, and that when it delegates such a power, a the state does not question that the improvement made is conformity with the power delegated, neither the necessi nor the usefulness of the improvement, nor the manner which it is made, can be called in question by private parti *Wis. River Imp. Co. v. Manson,* 43 Wis. 255, 265; *Fa Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 151, N. W. 257; *Underwood L. Co. v. Pelican B. Co.* 76 W 76, 85, 45 N. W. 18; *J. S. Keator L. Co. v. St. Croix Corp.* 72 Wis. 62, 81, 38 N. W. 529; *Cohn v. Wausau Co.* 47 Wis. 314, 326, 2 N. W. 546; *Black River Imp. C v. La Crosse B. & T. Co.* 54 Wis. 659, 686, 11 N. W. 44 It is true that none of the cases cited involved the rights a landowner whose property it was sought to condemn in a of the alleged improvement. But the same rule with litt if any, variation has been applied in a condemnation pr ceeding against a landowner (*Chicago & N. W. R. Co. Morehouse,* 112 Wis. 1, 9, 87 N. W. 849), and in an acti brought by a landowner whose lands were overflowed, abate a dam authorized by the legislature. *Allaby v. Ma ton E. S. Co.* 135 Wis. 345, 352, 116 N. W. 4. A dam a thorized for the creation of hydraulic power, generated f the purpose of sale, is authorized for a public purpose. *W River Imp. Co. v. Pier,* 137 Wis. 325, 118 N W. 857. T question of how far the legislature might destroy the pub use of navigation, in aid of the public use of generating h draulic power, is not involved under the facts in this ca because it appears from the evidence that the dam did i prove the navigation of the stream above its location, wh the alleged injury which the dam caused to navigation w inconsequential and largely theoretical.

6. It is next urged that respondent is seeking to conde lands for a private use. It is argued that whether the p ticular use for which property is sought to be condemned

ic or private is a question of fact, the ultimate decision hich rests with the courts, and the following cases are in support of the contention that the question urged is dicial one: *Wis. W. Co. v. Winans,* 85 Wis. 26, 54 N. W. ; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. *S. C.* 103 Wis. 537 79 N W. 780; *Matter of Niagara & W. R. Co.* 108 N. Y. 375, 15 N. E. 429. The right e courts to decide whether the purpose is public for which proposed to condemn property is undoubted. Such a rule not preclude the courts from according proper deference gislative declarations as to what constitutes a public pur- As heretofore stated, this court has uniformly held where a dam is constructed in a navigable stream in aid avigation, the purpose of its construction is public, and that the taking of property for the generation of electric er for the purpose of sale is a taking of property for a ic purpose. The mere fact that a dam would not have constructed were it not for the power generated by it not argue that the dam will not in fact aid navigation n built, and such a structure may be entirely lawful even gh the legislative authorization for its construction be ted to the purpose of aiding navigation. *Wis. River Co. v. Pier, supra.* We think the evidence presented he hearing fairly shows that the construction of the dam uestion will aid the navigation of the river above the loca- of the dam and will not materially interfere with it below such point, and that either of the purposes speci- in the act is public, so that the power of eminent domain legally conferred on the owners of the franchise.

The condemnation proceeding was pending in the Sixth cial circuit. Owing to the illness of the judge of that uit the judge of the Eighteenth judicial circuit was called o hear the petition for the appointment of commissioners made the order appointing them. It is urged that under provisions of secs. 5, 6, and 7, art. VII, of our constitu-

tion a circuit judge cannot exercise any of the powers of office outside of his own circuit, unless there are other pr sions in the constitution authorizing him to do so, and the only provision found which does authorize such actio sec. 11, art. VII, which empowers judges of the circuit co to hold court for each other. It is argued that the hol of court within the purview of the section last referre means holding one of the regular terms of the circuit co and does not permit the judge of one circuit to make or at chambers in another circuit.

It is true there is a distinction between holding court exercising judicial powers out of court. Still we think in the interest of the speedy administration of justice an sound public policy that the words "may hold courts," fo in sec. 11, art. VII, be liberally construed. No good re is apparent why a circuit judge of one circuit should be powered to hold court in another but should be denied right to transact other judicial business. Considering purpose which the framers of the constitution undoubt had in view, we conclude that the authority conferred judges to hold court for each other was meant to include erally the judicial business which a circuit judge is aut ized by law to transact. Moreover, the language used is missive. Circuit judges "may hold courts for each oth We do not think the provision quoted has precluded the islature from enlarging the powers which circuit judges exercise outside of their circuits, even if it be conceded only the power to hold court at a regular term is expre conferred by the constitution. The legislature has confe such power by sec. 2432, Stats. (1898).

By the Court.—Order affirmed.

KERWIN, J., took no part.

N RE SOUTHERN WISCONSIN POWER COMPANY: APPEAL OF WHITNALL.

September 14—October 5, 1909.

APPEAL from an order of the circuit court for Juneau county: AMES O'NEILL, Judge. *Affirmed.*

For the appellant there were briefs by *Cary, Upham & Black*, and al argument by *Alfred L. Cary.*

For the respondent there was a brief by *Jones & Schubring*, and al argument by *B. W. Jones.*

BARNES, J. This case in all material respects is identical with e appeal of the Black Hawk Land Company in *In re Southern Wisnsin Power Company, ante*, p. 245, 122 N. W. 801, and is controlled ereby.

By the Court.—Order affirmed.

KERWIN, J., took no part.

TATE EX REL. REDENIUS, Appellant, vs. WAGGENSON and others, Respondents.

September 15—October 5, 1909.

andamus: *When writ issues: Compelling repairs on drainage ditch: Lack of available funds.*

1. Although relator may have a clear legal right to have an act done, *mandamus* will not issue to compel performance by another unless it is the clear duty of the latter to perform at the time and in the manner demanded.
2. Where the right to have an act done at the time and in the manner demanded is dependent on some other act having been done or some condition existing, the petition for *mandamus* must show that such preliminary act has been done or condition created.
3. Where the doing of an official act requires the expenditure of money, performance will not be coerced by *mandamus* in absence of a showing that money therefor is presently available.

4. The petition for a writ of *mandamus* to compel drainage co missioners to repair a ditch did not show that they had mon available for that purpose, and did show that money was tainable therefor only by filing an annual report, securing ju cial approval, and collecting assessments as provided in ch. 4 Laws of 1905, and that no such report had been made althou it was the duty of the commissioners to make it. *Held*, th the writ would not issue to compel the making of the repai

APPEAL from an order of the circuit court for Monr county: E. W. HELMS, Judge. *Affirmed.*

Mandamus proceedings to require drainage commissione to repair the ditch under their charge.

An alternative writ of *mandamus* was issued in due for which, on motion duly made, was quashed because (1) t facts stated as a basis for the proceedings were insufficien (2) such facts were insufficient to show relator to be entitl to prosecute the proceedings.

The facts relied upon are, in brief, as follows: Relator the owner of certain lands through which a portion of drainage system has been constructed and put in operati under the laws of the state of Wisconsin. It has been t duty of the drainage commissioners since the installation the drainage system to keep such system in repair and, sin the passage of ch. 419, Laws of 1905, on or about the fi Tuesday of June each year to file with the clerk of the ci cuit court having jurisdiction of the matter a report specif ing in detail the repairs necessary and the sum to be assess to make the same against each tract, lot, easement, or co poration. About a year after the completion of the draina ditch through relator's land it commenced to fill up wi sand. The deposit therein has increased till it nearly fills t ditch, causing large quantities of water which would othe wise be carried down the same, to be deposited on relato land, rendering it valueless for farming purposes, to his gre damage. The commissioners have often been requested put the ditch in a proper state of repair but have wholly r

ed to do so. They have not filed any report as required the law aforesaid or raised any money to make necessary airs upon the ditch.

An alternative writ was issued as requested requiring the missioners to repair the drainage ditch where it passes ough relator's land, or show cause to the contrary before circuit court for Monroe county.

For the appellant there were briefs by *Graham & Graham,* oral argument by *J. G. Graham.*

For the respondents there was a brief by *Naylor & McCaul,* and oral argument by *W. R. McCaul.*

MARSHALL, J. Appellant's counsel present this appeal as since appellant has a clear legal right to have the drainage h repaired, the alternative writ, by which it was sought nforce such right, should not have been quashed. It does necessarily follow, because a person has a clear legal right ch can only be effective by the act of another, that it is clear duty of the latter to perform such act at the particu- time and in the particular manner such person may de- d it. It is fundamental that both conditions must exist; right and the duty to act, before the extraordinary rem- can be successfully invoked. *State ex rel. Pfister v. nitowoc,* 52 Wis. 423, 9 N. W. 607; *State ex rel. Board Ed. v. Hunter,* 111 Wis. 582, 87 N. W. 485; *State ex rel. . Met. Tel. Co. v. Milwaukee,* 132 Wis. 615, 113 N. W. *State ex rel. Rowe v. Krumenauer,* 135 Wis. 185, 115 W. 798; *State ex rel. Fire & Rust Proof C. Co. v. Icke,* Wis. 583, 118 N. W. 196.

When the duty sought to be enforced is of a private nature emand must be made for substantially that particular g, of the particular person upon whom the duty of per- nance rests; and his refusal thereof must precede appli- on for a writ to coerce such person to act; and the facts in regard must be made to appear in the petition for the

writ, to warrant its issuance. Merrill, Mandamus, §§ 223. Where the right to have the particular act done a time and in the manner demanded is dependent upon other act having been done or some condition existin order to show affirmatively by the petition for the writ the relator is entitled, as claimed, facts must be stated th showing that such preliminary act has been done or c tion created. *State ex rel. Spaulding v. Elwood,* 11 17; *State ex rel. Sloan v. Warner,* 55 Wis. 271, 9 N 795, 13 N. W. 255; *State ex rel. Neeves v. Wood Co.* 72 629, 40 N. W. 381; *State ex rel. Gericke v. Mayor, et* Wis. 322, 74 N. W. 783.

The quoted authorities are particularly applicable to case, in that they are to the effect that where the doi the official act in question requires the expenditure of m performance cannot be coerced by *mandamus* in absen a showing that money is presently available, applicab do the particular matter.

Now in this case there is no showing in the petition respondents had money which could properly be appli repair of the ditch. If they had no such money under control, it was plainly shown by the relator, as the fa that it was only obtainable by their filing a report, a drainage law (ch. 419, Laws of 1905) provides, specif among other things, in detail, the labor necessary to the ervation and protection of the improvement, the places ing repairs, and securing, on due notice and hearing, jud approval of the proposed work and expenditure, and d mination of the amount of the assessment upon each par lar parcel of land benefited, and collection of such as ments in due course,—and it was further alleged that no report had been made though the law requires one to be in the circumstances of respondents, annually, to the having jurisdiction of the matter. Thus by the statute left to the judgment of the commissioners, prelimina

to the court finally, what repairs to a drainage ditch are
ed, and the method is provided for obtaining the neces-
funds, which is necessarily exclusive.

he most the petition shows as to default on the part of
commissioners, is failure to make the required report.
action in that respect was demanded before commence-
t of these proceedings, nor do such proceedings contem-
e coercion of respondents in such respect. So far as is
osed, it is proposed to cause respondents to repair the
n regardless of whether there is money applicable there-
or whether the conditions precedent to the making of re-
s have been complied with, merely because there is need
the repairs and respondents have failed to present the
er to the court for consideration and direction and in
course to accumulate the necessary money to meet the
nse. In other words, it is proposed to compel respond-
to make the repairs at their own expense, as a sort of
lty for the default aforesaid, and take their chances of
recouping the same by collection of approved assess-
s upon the property benefited. Sufficient has been said
ow, clearly, that the facts stated in the petition for the
of *mandamus* do not constitute any basis for the relief
ht and, therefore, that the writ was properly quashed.
y the Court.—Order affirmed.

BRETZ, Respondent, vs. R. CONNOR COMPANY, Appellant.

September 15—October 5, 1909.

: Construction: Conveyance of standing timber: Time limit on removal: Agency: Change in deed before delivery: When grantors bound.

nder a deed conveying timber standing or situated on certain lands, "with the right to the" grantee "to enter upon said lands and remove said timber . . . at any time on or before" a

certain date, only such timber passes as is removed d
the time specified.

2. A person intrusted with a deed for the purpose of obtainin
signatures of the grantors and making delivery for them
clothed at least with apparent authority to close the de
their part; and where, on his presenting the deed to the
tee, the latter objected to the date specified therein as th
piration of the time within which a corporation must re
from the land certain standing timber which the grantor
conveyed to it, and the agent thereupon changed such da
correspond with that specified in the conveyance to the c
ration, the grantee had a right to rely upon the agent's a
ent authority and to accept the deed as thus changed, an
grantors were bound thereby.

APPEAL from a judgment of the circuit court for V
county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This action was brought to recover the value of pine
ber cut and removed by the defendant from the north
quarter of section 10, township 27, range 2 east, in M
thon county. The defendant claimed title under a
dated May 17, 1901, which contained the following p
sion:

"All the merchantable log and basswood bolt timber st
ing or situated on west one-half of section ten (10), so
east quarter and west half of northeast quarter of section
(10), and the west half of southwest quarter of section n
ber eleven (11), all in township number twenty-seven (
range number two (2) east. Also with the right to the p
of the second part to enter upon said lands and remove
timber and to do such work as is necessary for removi
said timber, at any time on or before two years from A
15, 1901."

The deed of the timber to defendant was given by Ec
L. Reese, Adam Paulus, and W. D. Connor, and reco
May 20, 1901. Most of the timber was cut during the
ter of 1902 and 1903, but some remained after April
1903. On the 19th day of September, 1902, said Pa

ese, and Connor deeded a quarter-section of this land to plaintiff, which deed contained the following provision:

'Excepting and reserving the merchantable saw-log timber l bolts heretofore sold to *R. Connor Co.*, with the right to er upon said land to remove said timber any time prior April 15, 1903 (1903)."

It was claimed on the trial that the deed from Paulus, ese, and Connor to the plaintiff had been changed after cution so as to make the right to enter upon the lands to nove the timber read, "any time prior to April 15, 1903," ereas as originally executed it read "April 15, 1904," and t such deed on its face bore evidence of the change. The e was submitted to the jury and the following verdict re- ned:

'(1) Was the plaintiff's deed, after being signed by Adam ulus and Edward L. Reese, changed by W. D. Connor by nging the year '1903' to the year '1904' in the clause re- ing to the time for the removal of timber? *A.* No.

'(2) Did W. D. Connor consent to the change in plaint- s deed as made by Mr. Reynolds of '1904' to '1903'? No.

'(3) Did the defendant, before entering upon the south- t quarter of section 10 to cut the timber, acquire a title the timber in question in good faith, believing the same to valid? *A.* Yes.

'(4) During his negotiations with Reynolds did Paulus orm Reynolds, in substance, of the extension of time to defendant for the removal of the timber, and that such ension, in case of a sale of the lands, must be protected to satisfaction of W. D. Connor? *A.* Yes.

'(5) Did the defendant, on and after November 1, 1903, good faith enter upon said land and cut the timber there- m, believing it then had a valid title thereto? *A.* Yes.

'(6) What was the true stumpage value of the timber cut the defendant on the southeast quarter of section 10 dur- the fall and winter of 1903–04? *A.* $365.64.

'(7) What was the highest market value of the timber cut

on plaintiff's land, after it was manufactured into lumbe
Auburndale, Wisconsin, and while in defendant's pos
sion? *A.* $1,546.25."

Both parties moved for judgment on the verdict. T
court denied defendant's motion and ordered judgment
the plaintiff on the verdict for $365.64. Judgment was
tered accordingly in favor of the plaintiff against the
fendant, from which this appeal was taken.

For the appellant there was a brief by *Goggins & Braze*
and oral argument by *B. R. Goggins.*

For the respondent the cause was submitted on the br
of *L. M. Sturdevant,* attorney, and *C. B. Edwards,* of co
sel.

KERWIN, J. It is first contended by appellant that
deed conveyed an absolute title in the timber to defenda
and therefore the subsequent deed to plaintiff conveyed o
the remainder of the estate. This contention is denied by
spondent, and he insists that only such timber as was remo
before April 15, 1903, passed to defendant by the deed to
Both parties rely upon the same authorities to sustain th
respective positions under this head. The question is an
portant one and not free from difficulty, if we should reg
it unsettled in this state. There is much conflict of auth
ity in other jurisdictions, and much force in the position
appellant to the effect that the deed to defendant conve
an absolute title to the timber described in the deed and
such as should be removed within the two years specifi
The court, however, is forced to the conclusion that, un
the settled doctrine in this court, by a conveyance of tim
similar to the one in the deed to defendant only such tim
passes by the deed as is removed during the time specified
the deed. *Golden v. Glock,* 57 Wis. 118, 15 N. W. 12; *Hi*
v. Smith, 77 Wis. 146, 46 N. W. 133; *Williams v. Jones,*
Wis. 361, 111 N. W. 505; *Peshtigo L. Co. v. Ellis,* 122 W

, 100 N. W. 834; *Western L. & C. Co. v. Copper River* Co. 138 Wis. 404, 120 N. W. 277.

n September, 1902, the defendant's grantors, Paulus, se, and Connor, conveyed to the plaintiff a quarter-section he land covered by the deed to defendant on which some he timber mentioned in the deed to defendant remained ut. This deed contained the clause set out in the state- t of facts. After the deed to plaintiff had been signed by lus and Reese it was presented to Connor for signature, he insisted that the clause for removal read "April 15, 4," instead of "April 15, 1903," and when signed by Con- it read April 15, 1904. One Reynolds and others asso- ed with him negotiated the sale to plaintiff. When the l was presented for delivery plaintiff objected to the se respecting removal of the timber to April 15, 1904, Reynolds thereupon changed it so as to read April 15, 3. The jury found that Connor never consented to this nge, although it appears that Reynolds called him by ne and informed him of the request of plaintiff, and that nor made no reply, except said "Well," and hung up the iver. It further appears from the evidence that it was erstood between defendant and its grantors that defend- should have further time to remove the timber conveyed that specified in its deed. It does not appear, however, when plaintiff accepted his deed he had knowledge of agreement, but understood he was getting a deed subject to the provisions of the deed to defendant, with the res- tion to enter and remove the timber mentioned before il 15, 1903.

Now the question arises whether plaintiff was bound by time limit of 1904. He accepted the deed as changed by nolds, making the removal period to expire April 15, 3, and paid the consideration on the faith of such con- nce. It is vigorously contended by counsel for appel- that Reynolds was not the agent of Connor in making

the change from April 15, 1904, to April 15, 1903, and the grantors were not bound thereby; while on the other h it is insisted by respondent that Reynolds was the agen the grantors, and that plaintiff had the right to rely u the terms of the deed as finally delivered by Reynolds, that the transaction was closed and the consideration pai the faith of such deed. It is without dispute that Reyn was intrusted with the deed for the purpose of obtaining signatures of the grantors and making delivery for th So he was clothed at least with apparent authority to c the deal on the part of the grantors. This being so, plaintiff, grantee, had a right to rely upon such apparent thority and pay the consideration on the terms of the thus delivered.

No attempt was made on the part of either party to res or repudiate the transaction as closed. We think, under circumstances of the case, the grantors were bound by change to 1903 as made by Reynolds. It is established the timber in question was cut by defendant after the t for removal had expired, namely, after April 15, 1903.

Many other questions are argued by counsel, but in view we take of the case discussion of them seems unne sary. It follows from what has been said that the judgm below is right and must be affirmed.

By the Court.—The judgment of the court below is firmed.

BARNES, J., took no part.

TELLO, Respondent, vs. CITIZENS STATE BANK OF MANAWA, Appellant.

September 16—October 5, 1909.

s and banking: Oral contract of deposit: Revocation: Cashier issuing his personal check instead of certificate of deposit: Retention by depositor: Estoppel: Waiver: Questions for jury.

Evidence tending to show that plaintiff's husband, having money in the hands of the cashier of defendant bank, told the cashier and plaintiff that he wished to give the money to plaintiff, told the cashier to give her a certificate of deposit therefor, and advised plaintiff to get such a certificate; that the cashier, who had full charge of the business of the bank, informed plaintiff that if she left the money in the bank for six months she would get three per cent. interest, but if she took it out before that time she would get no interest, and at the same time wrote out his personal check on the bank and handed it to her; that she took the check supposing it to be a certificate of deposit, and kept it for several months without demanding payment thereon and without knowledge of its true character; that she was inexperienced in business; and that there was nothing unless it was the check to suggest a loan by plaintiff to the cashier personally,—is *held* sufficient to warrant the jury in finding a contract of deposit between plaintiff and the bank.

Assuming, as found by the jury, that prior to delivery of the check to plaintiff there was an oral contract of deposit between the bank, acting through its cashier, and the plaintiff, it cannot be held as matter of law that the substitution of the cashier's personal check therefor and its acceptance and retention by plaintiff under the circumstances stated revoked or discharged such oral contract or estopped the plaintiff to enforce it, even though it appeared that had she carefully examined the check she would have known the difference between it and a certificate of deposit, and had she presented it for payment within sixty days it would have been paid.

Waiver must be with knowledge or with reasonable means of knowledge of the facts and with intent to forego some right, although the knowledge may be either actual or constructive and the intent expressed or implied.

PPEAL from a judgment of the circuit court for Waupaca ty: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Llewellyn Cole, for the appellant, cited, among other c
Bickley v. Commercial Bank, 39 S. C. 281, 17 S. E.
S. C. 43 S. C. 528, 21 S. E. 886; *Jumper v. Comme*
Bank, 39 S. C. 296, 17 S. E. 980; *Bostwick v. Mut. L.*
Co. 116 Wis. 392, 89 N. W. 538, 92 N. W. 246.

Byron B. Park, for the respondent, cited, among othe
thorities, *Heim v. First Nat. Bank,* 76 Neb. 831, 107 N
1019; *Coleman v. First Nat. Bank,* 53 N. Y. 388; *Ziegl*
First Nat. Bank, 93 Pa. St. 393; *Steckel v. First Nat. B*
93 Pa. St. 376, 39 Am. Rep. 758, and other cases.

TIMLIN, J. Upon a complaint averring that on Au
28, 1906, the plaintiff deposited with defendant
$1,527.04 under a contract made with said bank that, i
said money should remain on deposit for a period o
months from said date, said bank would pay to the plai
said sum with interest thereon at the rate of three per
per annum, or, if not left six months so as to draw said
of interest, then to be paid to the plaintiff at any time
to the expiration of said six months on her demand, and
demand was made and payment refused, the plaintif
covered of the defendant bank the said sum with interest
the date of demand. Defendant appeals, alleging erro
that there was a material variance between the allegatio
the complaint and the proofs, and error in overruling
fendant's motion for direction of a verdict in its favor.

The evidence of the respondent tended to show that
husband, having this money in the hands of defendant's
ier deposited in the account of the latter in the defen
bank and presently payable, desired to give the money t
respondent, and made this known to the cashier, the resp
ent, and others present. He told the cashier to give th
spondent a certificate of deposit and advised her to get
tificate of deposit. The cashier then informed her th
she left the money in the bank for six months she woul

e per cent. interest, and if she took it out before that time would not get any interest, and at the same time wrote his personal check on the defendant bank and handed it e respondent, who looked at it, supposing it to be a cer-ate of deposit, and took and kept possession of it without and of payment until January 19, 1907, and without ac-knowledge of its true legal character. Respondent was e time a married woman thirty-one years of age, had on a farm all her life except the two years preceding the saction in question, during which time she lived in the ge with her husband, who kept a livery stable. She had eparate estate and had never been in any line of business. re was nothing to suggest a loan of money from respond-o the cashier personally unless it be the check above men-ed. The cashier was the principal executive officer of defendant bank and had full charge of all its business.

here was upon the foregoing facts at least a question for jury whether or not the cashier understood that the re-dent and those speaking for her were proposing a con-of deposit between respondent and the bank to be made ugh the cashier in his official capacity, and whether or the cashier did in this capacity assent to the same or de-edly lead the respondent to believe that he assented to the e, prior to the execution of the check in question. As to respondent the cashier was *prima facie* representing the t, and he in no way prior to the execution of the check ght the fact to her notice or knowledge that he was act-or claiming to act in his personal or individual capacity. contractual effect of passing out the check under the cir-stances to an inexperienced woman was at least a matter the jury. *Kaley v. Van Ostrand,* 134 Wis. 443, 114 V. 817. If the cashier intended that the plaintiff should erstand that she was making a contract with the bank and plaintiff did so understand, that is sufficient, there being bvious consideration for such a contract. The cases cited

by the respondent and above noted amply sustain the au
ity of the jury to find a contract of deposit between th
spondent and the bank upon this evidence. *Heim v.*
Nat. Bank, 76 Neb. 831, 107 N. W. 1019, and cases.

The appellant next contends that accepting the per
check of the cashier on August 28, 1906, then failing t
amine it carefully or to read it, and thereafter holding i
til January 19, 1907, without examination of the check c
jection, brought the case within the rule of *Bostwick v.*
L. Ins. Co. 116 Wis. 392, 89 N. W. 538, 92 N. W. 246
that the trial court should have directed a verdict for de
ant. There was no request upon the part of the appella
have the question of waiver or estoppel submitted to the
but it is claimed that by reason of the facts aforesaid, co
with the fact that the respondent admitted that had she
fully examined the check she would have known the d
ence between that and a certificate of deposit, and the
ther fact that had she presented the check for payment a
time within sixty days after its receipt by her it would
been paid by the bank, a verdict should have been directe
the appellant. The check was headed with the name o
bank, followed by these words: "Pay to the order of
Thomas F. Castello $1,527.04 fifteen hundred twenty-
and four one-hundredths Dollars. G. E. Soli." The
nary form of a certificate of deposit following the same
ing would have been: "This certifies that *Mrs. Thom*
Castello has deposited in this bank $1,527.04 [repeated]
able to her order upon the return of this certificate pro
indorsed. G. E. Soli, Cashier." This would probably b
lowed by a memorandum printed or stamped thereon
ing to the interest terms. The difference is very plain
lawyer, and the difference is rather in substance than
pearance or form, and to an inexperienced person the
ence is not so striking as to arouse attention, even t
such person might, upon carefully reading it, have obs

l appreciated the difference. We must take up this ques-
n upon the assumption that prior to the delivery by the
hier of his personal check to the respondent there was an
l contract of deposit made and concluded between the re-
ndent and the bank as found by the jury. Its terms were
agreed upon, and it remained for the cashier to reduce
m to writing in the form of a certificate of deposit. *Bost-
k v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92
W. 246, much relied upon by appellant, is not in point.
at was an action at law to rescind a contract whereby the
urance company undertook to deliver a certain kind of pol-
or contract. The transaction sought to be rescinded was
ffect a sale of several policies of life insurance to Bostwick
l others. The latter received and retained for a long time
thing purchased without carefully examining it for de-
ts patent on its face, and during this time had the option,
case of death, to hold the insurance company as insurer.
ere was no existing insurance contract between Bostwick
l the company at the time the company sent in the proposed
icy, but the policy was forwarded to Bostwick in execution
a contract for the same and under a claim that it complied
h the prior executory agreement.

In the case at bar there was first a valid oral contract be-
en the bank, acting through its cashier, and the respondent
which the cashier without the knowledge or consent of
respondent substituted a writing in a form and by a per-
entirely unauthorized. The cashier's check thus never
ame a contract at all, because not assented to, nor even a
posal to contract, because not brought to the attention of
other party. The prior oral contract could only be re-
ed by mutual consent or discharged by release or its en-
ement prevented by estoppel. There was neither revoca-
, release, nor estoppel in the case at bar by mere reten-
of this check without knowledge of its contents on the
of respondent and under the mistaken impression that it

was given pursuant to and truly represented the anterior
contract of deposit. True, the acceptance and retentio
the check was evidence going to show that the contract of
posit was made with the cashier personally and not with
bank, while the sex and inexperience of the respondent
her apparent reliance upon the bank, and the fact that
did not read or examine the check or know its contents, v
facts tending to the contrary.

Waiver must be with knowledge or with reasonable me
of knowledge of the facts and with intent to forego s
right, although the knowledge may be either actual or
structive and the intent expressed or implied. *Pabst B.*
v. Milwaukee, 126 Wis. 110, 105 N. W. 563; *McNaugh*
v. Des Moines L. Ins. Co., ante, p. 214, 122 N. W. 7
The probative effect of her retention of the check under s
circumstances is not so absolute as to authorize the direc
of a verdict for the defendant.

By the Court.—The judgment of the circuit court is
firmed.

KARNES, Respondent, vs. KARNES, Appellant.

September 16—October 5, 1909.

Appeal: Findings: Divorce: Desertion.

1. Where the trial court made no specific findings of fact, but fo
generally that the allegations of the complaint were proven
true, it will be assumed, on appeal, that it found in plain
favor upon all controverted questions of fact.
2. In an action for divorce a finding that defendant wilfully dese
plaintiff for the statutory period is *held* not so clearly ag
the preponderance of the evidence as to warrant reversal of
judgment.

APPEAL from a judgment of the circuit court for D
county: E. W. HELMS, Circuit Judge. *Affirmed.*

The appeal is from a judgment granting a divorce upon e ground of wilful desertion for the period of one year next eceding the commencement of the action.

For the appellant there was a brief signed by *J. W. Ma-uley,* attorney, and *Thomas Carmody,* of counsel, and oral gument by *Mr. Macauley.*

J. R. Mathews, for the respondent.

BARNES, J. The defendant seeks a reversal on two ounds: (1) Plaintiff failed to establish the fact that he was esident of Wisconsin for the period of one year prior to e commencement of the action; and (2) the evidence failed establish wilful desertion.

The first ground of error may be dismissed by asserting at the evidence was ample to establish the fact that plaint- was a resident of the state the requisite length of time be- re bringing his action.

The second ground of error is more substantial. There s direct conflict in the testimony offered by the respective rties on most of the material matters testified to. The urt made no specific findings of fact, but found generally at the allegations of the complaint were proven and true. e must assume that it found all controverted questions of et in favor of the plaintiff. It was not denied that de-ndant deserted the plaintiff about two weeks before he left ew York and came to Wisconsin. It is likewise true that fendant returned to plaintiff's home about eight days after e left, but the evidence would amply justify a finding by court to the effect that she did not return for the purpose living with her husband, but for the purpose of securing clothing and personal effects. It is also true that the intiff never advised the defendant of his whereabouts, or t her any money or provided for her support after he left state of New York, except as she realized a small sum of ney from some property which he had at the time of his

departure. But the defendant did desert the plaintif
fore he left New York, and without just cause, as the
found, and as it had a right to find on the testimony.
defendant does not claim that she was ever either read
willing to resume her marital relations with plaintiff, e
as she testified that she returned to his home. As alr
said, the court was warranted in finding that she did nc
turn for the purpose of living with plaintiff. Upon the
of the record we cannot say that the finding by the cou
wilful desertion on the part of the defendant for the s
tory period was so clearly against the preponderance o
evidence as to warrant this court in reversing the judgr

By the Court.—Judgment affirmed.

HARLEY, Respondent, vs. HARLEY, Appellant.

September 16—October 5, 1909.

Ejectment: Right to possession: Pleading: Defenses: Necessary parties, how brought in: Equitable estates: Dower and homestead rights of widow in possession.

1. One cannot recover in ejectment unless he is entitled to p
sion at the time he commences his action.
2. A legal defense in ejectment is not pleadable as a counterc
since otherwise by the forms of pleadings a defense raisi
sues as matter of right commonly understood to be triable
jury could be so interposed as to require trial by the court
3. If a person on a sufficient consideration agrees to convey re
tate to another as his property and puts such other into p
sion pursuant thereto, who subsequently, while in such p
sion, dies intestate, leaving a widow and children, the ci
stances being such that such person could have been judi
compelled to convey the land, pursuant to the agreement, t
executory vendee had he lived and such person neverth
brings ejectment against the widow who is in possession
her children, such facts are a good legal defense, and are
able as an equitable defense as well to secure appropriate

In the situation above stated the defendant may have the benefit of the equitable defense and obtain such affirmative relief as to fully protect her notwithstanding her children are not made defendants, unless their presence in the litigation is necessary for their due protection or in order that a full determination of all the issues may be had.

In the contingency suggested the court should not dismiss the action nor render judgment in plaintiff's favor, but should, on his own motion, order the necessary parties brought in unless some one presently a party so moves.

In the situation stated in number 4 the widow for her life or widowhood is the equitable owner of the homestead, if there be one, with the right to be clothed with the legal title to that extent, and the owner of a dower right in the other lands, if there be such, with the right to be clothed with such title as will fully protect such dower right.

If a widow with her children is left by the death of her husband in possession of land in which she has a dower right she may at law maintain that position without having her dower assigned.

A widow's dower in land will enable her not only to defend her possession if left therein with her children by her husband at his decease, without having such dower assigned, but whether she has issue by such husband or not she may maintain ejectment to obtain such dower.

The homestead right which descends as such on the death of a husband leaving a widow and children, attaches to the home property even though the husband had only the full equitable title thereto.

A full equitable title to real estate and like beneficial interest therein, the holder of the legal title having no duty to perform in respect to the property except to convey the legal title to the owner of the equitable title, is an estate of inheritance within the meaning of the dower statute.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dunn nty; E. W. HELMS, Circuit Judge. *Reversed.*

Action of ejectment.

The matter litigated and basis for judgment as indicated the findings may be concisely stated thus: Plaintiff holds legal title to the premises in dispute consisting of eighty es of land. He is the father of Charles Harley, who died

intestate August 12, 1903, leaving surviving the defen
his widow, and three children. Prior to the marriage o
fendant and Charles plaintiff gave the latter the real e
mentioned with the understanding that he and defen
should become man and wife and move upon, occupy,
improve the premises as the property of Charles. The
title was never parted with by plaintiff. The marriage
templated took place and all conditions of the gift were
isfied by defendant and Charles taking possession of
premises as property of the latter and their occupying
using the same as such thereafter with plaintiff's approb
till Charles died, during which time he made valuable
provements upon the land supposing that he was the
owner thereof and that plaintiff would convey the sam
him as he had promised to do. September 23, 1907,
long after the commencement of this action, defendan
came the wife of one Johnson. She was in possession o
premises in dispute with her children at the time this a
was commenced and has been so circumstanced since
death of her husband. No assignment of dower has
made to her.

On such facts, notwithstanding defendant pleaded all
facts stated as aforesaid as a defense and also as a cou
claim and prayed for judgment requiring plaintiff to c
out his agreement with Charles by conveying the pren
vesting in her and her children the title which would
come to them upon the death of Charles had he died se
of the legal title, the court decided that, since plaintiff
the legal title, defendant could not prevail in ejectmen
her equitable defense, neither could she prevail on her c
terclaim without presence in the litigation of her child
and that though plaintiff had no right to possession of
premises as against the heirs of Charles, since she was no
titled to possession by virtue of any dower interest, plai
was entitled to recover.

J. R. Mathews and *R. E. Bundy,* for the appellant.

For the respondent there was a brief by *Arthur H. Shoemaker* and *J. W. Macauley,* and oral argument by *Mr. Shoemaker.*

MARSHALL, J. The learned trial court decided this case upon the theory that, because of plaintiff having the bare legal title to the property in question without any real right of possession,—the whole equitable title and beneficial interest being, as was supposed, in the minor heirs of the deceased husband of appellant and, necessarily, also the right to be clothed with the legal title,—he was entitled to recover, since, as the court held, the facts could only prevail in equity as against him at the suit of the minors who were not parties to this action.

The grounds for the judgment are quite novel. They seem to fatally conflict with the elementary principle that in order to enable a person to recover in ejectment he must at least be entitled to possession of the property in dispute at the time of commencing the action. One may have the legal or equitable title without the right of possession, in which case, obviously, he cannot recover in ejectment, and the facts showing that he has no such right constitute a legal defense and so not only need not, but cannot properly, be interposed as an equitable defense in the form of a counterclaim. *Page v. Kennan,* 38 Wis. 320; *Lawe v. Hyde,* 39 Wis. 345, 354; *Pennoyer v. Allen,* 51 Wis. 360, 8 N. W. 268; *Brown v. Cohn,* 88 Wis. 627, 60 N. W. 826; *Appleton Mfg. Co. v. Fox River P. Co.* 111 Wis. 465, 87 N. W. 453. The reason thereof is that the statute (sec. 3078, Stats. 1898) as it has been construed provides that equitable defenses only must be pleaded in form as counterclaims and the issues be tried by the court. *Lombard v. Cowham,* 34 Wis. 486; *Du Pont v. Davis,* 35 Wis. 631; *Lawe v. Hyde,* 39 Wis. 345; *Stowell v. Eldred,* 39 Wis. 614; *Fuchs v. Treat,* 41 Wis. 404; *Dobbs v. Kellogg,* 53 Wis. 448,

10 N. W. 623; *Weld v. Johnson Mfg. Co.* 86 Wis. 54 N. W. 378. Therefore it is not permissible to chang character of the trial tribunal, as from one of law to o equity, by the form of the pleadings. There is an abs right to a jury trial of the legal issue in ejectment. cannot be allowed to be invaded by treating such issue as table.

It cannot well be maintained but that the facts pleade found here constitute a legal defense and so were not req to be pleaded as a counterclaim, or but that they cons such defense and, for reasons which will hereafter be st they constitute a good equitable defense as well. The le trial court, as before indicated, held that the minors wer only parties really interested adversely to respondent that, since they were not parties to the action, appellant not by counterclaiming maintain her possession and o relief in their favor.

True, a counterclaim, in the general sense, must be constituting a cause of action in favor of the defe against the plaintiff. The trial court was not called up deal with such a matter, but, at the best for respondent, an equitable defense, one which under the old practice defense as distinguished from a counterclaim. It mu remembered that this whole subject is governed by the and, therefore, it is only confusing and misleading to ancient authorities or such as do not recognize fully the system.

The statute provides that "the defendant . . . may in his answer set up any matter as a defense which v have heretofore formed an equitable defense, in which the answer shall contain a demand for such judgment claims. . . ." Sec. 3078, Stats. (1898). Facts showing a party, sued in ejectment, is in possession under or i right of a person who should be clothed with the legal tit act of the person seeking to gain that possession in ejectm

re been recognized as an equitable defense under the stat-
. *Hegar v. C. & N. W. R. Co.* 26 Wis. 624; *Fisher v.*
olick, 13 Wis. 321. Facts in general going to show that,
equity, plaintiff in ejectment is not entitled to possession
reason of the right in that regard being in defendant or
latter and others under whom he rightfully claims, have
n so recognized. *Prentiss v. Brewer,* 17 Wis. 635; *Du*
nt v. Davis, 35 Wis. 631, 639. Therefore, the ground
on which the learned trial court refused appellant the bene-
of the defense pleaded as a counterclaim is untenable.

If the preceding were not correct the facts pleaded con-
uted a plain legal defense to the action as to the home-
ad forty because a legal right to a full equitable title to
t descended to respondent to hold for life or during the
iod of her widowhood (sec. 2271, Stats. 1898), and was
re vested at the time of the commencement of this action
l for a long time thereafter, as indicated in the statement
facts. Moreover, she was entitled to possession of the
ole with her children, who were the real equitable owners,
their representative, subject to the homestead right and
ver right, in case of there being any, against any person
having a better right.

The appellant had an undoubted right, upon the facts
ed as matter of defense and found, to judgment establish-
her right of possession. She also had a right, on the same
ts pleaded as a counterclaim, to have the affirmative relief
ed in confirmation and protection of her homestead right.
reover, if it were necessary for the other heirs to be before
court for their due protection, or because a complete de-
mination of the controversy was otherwise impossible,
ich does not seem to be the case, they should have been
ught in under sec. 2610, Stats. (1898), whether there was
equest therefor by either party or not, instead of rendering
lgment for plaintiff with costs, as was done. Sec. 2610,
ts. (1898); *McDougald v. New Richmond R. M. Co.* 125

Wis. 121, 129, 103 N. W. 244; *Dahlman v. Milwaukee*, Wis. 468, 475, 110 N. W. 483; *Hagan v. McDermott*, Wis. 490, 494, 115 N. W. 138.

The trial court suggested without deciding, that appe was not entitled to dower in the property under sec. 2 Stats. (1898), since her husband died seised of an equi title only. If that be wrong the judgment is clearly er ous, since, where one has an unassigned dower right a left, at the death of her husband, with her children in p sion of the property in which such right subsists, she ma tain such possession by virtue of sec. 3872, Stats. (18 without having such dower assigned. She may assert right effectively in ejectment both for defense and at Sec. 3094, Stats. (1898). Here again, as at substant all points in the matter of judicial procedure, the Code erns, not the common law.

The question of whether a widow is entitled to dow real estate of which her husband dies possessed of only *a equitable title,* has been recently considered and resolve the negative by this court in *Will of Prasser, ante,* p. 121 N. W. 643. It was there said that an estate of inh ance, as the term is used in the statute, is just what term signified at common law, consequently that the st gives dower only out of legal estates. But where the band dies seised of the full equitable title and the own the whole beneficial interest, with only the mere legal outstanding in a person having no duty to perform in re to the property, as in this case, but to convey it to the table owner, the estate is to all intents and purposes a estate,—an estate of inheritance, within the meaning o statute, in which the wife is entitled to dower.

The last foregoing may be, and probably is, out of harm with some decisions elsewhere under statutes similar to but it needs and will have no defense at this time by r ence to supporting authorities. It is in harmony with doctrine of this court that the dower right is to be favor

law (*Munger v. Perkins,* 62 Wis. 499, 22 N. W. 511), the better rule as we are constrained to believe. If the tute will reasonably permit of a construction which will e the dower right and also one which will defeat it, and ere is uncertainty as to which was in the minds of the law-kers when the statute was adopted, the former should pre-il. At such time, as now, such an interest in real prop-y as that of which appellant's husband died possessed was garded as realty; an estate of inheritance, in the broad se of the term, which passes to the heirs and to which the mestead right attaches. *Chopin v. Runte,* 75 Wis. 361, 44 W. 258. We are entirely satisfied with the decision re-tly rendered, treating a full equitable title and ownership the entire beneficial interest in realty and right to be im-diately clothed with the legal title, as here, as substantially egal estate and within the meaning of the dower statute.

By the Court.—The judgment is reversed, and cause re-nded with directions to render judgment in appellant's vor in accordance with this opinion.

TIMLIN, J., dissents.

APA VALLEY WINE COMPANY, Respondent, vs. CASANOVA and another, Appellants.

September 16—October 5, 1909.

ency: Liability of principal for purchases: Secret agreement limiting authority.

Defendants having sold the stock of liquors and glassware used in a saloon business and turned the business over to the purchaser, to be continued by him in their name, under licenses issued to them, until the purchase price and cost of the licenses was repaid, a private and undisclosed agreement that he should not commit them to liability for supplies purchased by him for the business would not protect them against a claim for such supplies by one who dealt with him in the ordinary line of such business without knowledge of the restriction.

APPEAL from a judgment of the circuit court for St. C
county: E. W. HELMS, Circuit Judge. *Affirmed.*

The defendants, copartners, conducted a brewery bus
at Hudson, Wisconsin. They had come into ownershi
the stock, furniture, fixtures, and lease of a saloon at St
seph, and were conducting the same through an empl
when they effected a sale to one McMahon of the stock o
uors and glassware; the defendants retaining the lease
furniture and agreeing to procure the licenses, both state
municipal, in their own name, whereupon McMahon w
take over the business and pay over to the defendants,
sales, as rapidly as possible, the purchase price and the
of the licenses. This he proceeded to do, with the lic
publicly exhibited inside and a sign of the defendants'
on the exterior of the building. The plaintiff sold McM
a quantity of liquors for use in the saloon upon McMa
statement that he was running the saloon for the defend
which he confirmed by calling attention to the licenses.
fendants refusing to pay, this action was brought ag
them.

The court found as a fact "from all the transactions a
panying the installation of McMahon that it was under
between him and the defendants that the business of ru
such saloon should be continued in the name of the de
ants." Also that the goods were sold upon the belief
the business was being conducted for and in behalf of th
fendants and were used in such business. Accordingly
ment was rendered for the plaintiff for the unpaid ba
of the purchase, some $60, from which the defendant
peal.

A. J. Kinney, for the appellants.

For the respondent there was a brief by *Baker & H*
and oral argument by *Spencer Haven.*

DODGE, J. While, as the trial court says, the evide
somewhat nebulous and indefinite as to what the parti

stood, yet there was a fair issue of fact for that court to ide. The evidence does not preponderate at all clearly inst his conclusion that the intention was that the business uld be run as that of the defendants until they were reim- sed the amount of McMahon's indebtedness to them; and t one of the usual and essential powers incident to the ning of such a business, remote from the principal's resi- ce, is the purchase of supplies to be used therein. This ng so, a private and undisclosed agreement that he should commit defendants to liability for such purchases would protect them against a claim by one dealing with McMa- in the ordinary line of such business without knowledge such restriction. *Roche v. Pennington,* 90 Wis. 107, 112, N. W. 946; *McDermott v. Jackson,* 97 Wis. 64, 71, 72 W. 375; *Parr v. Northern E. Mfg. Co.* 117 Wis. 278, 287, N. W. 1099; *Abrohams v. Revillon,* 129 Wis. 235, 107 W. 656; *Ferris v. Kilmer,* 48 N. Y. 300, 304.

By the Court.—Judgment affirmed.

ILL OF MULLAN: FOWLER, by guardian *ad litem,* Appellant, vs. CRANDALL, Respondent.

September 16—October 5, 1909.

Wills: Mental capacity: Undue influence: Evidence.

Evidence showing, among other things, that although the faculties of a testatrix were somewhat impaired by age she still had mental powers sufficient to call to mind the particulars of her business and to hold them in mind for such a time as to perceive and understand their obvious relations and to form a rational judgment in respect to them, is *held* to sustain a finding that she had sufficient mental capacity to make a will.

Evidence which, among other things, fails to show any solicitation by any one for the making of the will, or that the testatrix was susceptible to the influence of others in such matters, is *held* to sustain a finding that the execution of the will was not procured by undue influence.

APPEAL from a judgment of the circuit court for
county: E. W. HELMS, Circuit Judge. *Affirmed.*

This proceeding was commenced in the county cou
Dunn county by a petition for the probate of the will of
R. Mullan, deceased. A contest was filed to the proba
behalf of *Hattie Fowler,* an insane daughter and the sol
at law of the deceased. The county court found that th
tatrix did not have sufficient mental capacity to make
at the time of the execution of the alleged will and tha
execution of it was obtained by fraud and undue influ
Probate of the writing was denied. Upon appeal to th
cuit court judgment was entered reversing the judgme
the county court and ordering the probate of the alleged
This is an appeal from such judgment.

Mary R. Mullan died at Red Wing, Minnesota, Feb
13, 1908, aged seventy-four and one-half years. The al
will was executed two months before at the residence of
Crandall in Red Wing, to which the deceased had gone i
previous October from her home at Menomonie, Wisc
Hattie Fowler, a daughter and the sole heir at law of th
ceased, is the contestant. She has been confined in a c
insane asylum since 1892. The deceased also left surv
her three sisters and four brothers. Maggie Crandal
wife of *R. D. Crandall,* was taken into the home of th
ceased when she was seven years of age, and continu
live there until her marriage. She was never adopted
is referred to in the will as the adopted daughter of th
ceased. After providing for the debts of the deceased
for funeral expenses, the will gives *Hattie Fowler* $3
$10 is given to each of the brothers and sisters of th
ceased; and the residue of the estate is then devised to M
Crandall and her husband. The deceased at the time
death possessed about $100 worth of personal property.
balance of her estate, between $26,000 and $28,000, con
of real estate, about one half of which was situated in M

ta and one half in Wisconsin. Her indebtedness, exclusive $1,000 incurred as funeral expenses, was from $5,000 to ,000. The estate of the deceased had been accumulated by nducting a millinery store in Menomonie. She had been ice married; her first husband dying some fifteen years fore she did, and her second husband four or five years be- re.

In behalf of the contestant of the will it is claimed that the idence introduced shows that the deceased was of insuffi- ent mental capacity to make a will; that she was physically eak and feeble, and that her mental faculties had become paired to such an extent that she was unable to compre- nd and understand her business affairs; that she was un- le to keep in mind her relationship and natural obligations her daughter and relatives, and lost mental control of her- lf and her property to an extent which evinced her incapac- to transact business or to make a will; and that this con- tion had existed for a considerable time before the making the will in question. It is also claimed that she was so duly influenced by one Boardman and the Crandalls to ake this will that it is not the expression of her wishes and sires in the final disposition of her property, and that there- re it was a fraudulent proceeding by these parties for their rsonal gain and benefit. On the other hand it is claimed at the evidence shows that the deceased had never been a od manager of her property; that the feebleness of body d dullness of the senses were only the accompaniments of e, and that the insistence of the deceased for participation her numerous business transactions indicates that she re- ined an unusual and sufficient mental capacity to do busi- ss and to attend to her affairs; that, far from being the ctim of undue influence, she was a self-reliant and assertive rson and always attended to her affairs; that she fully mprehended and understood them, and acted freely in the aking of the will and the disposition of her property.

After a full hearing the circuit court held that she
sufficient mental capacity to make a will and that she was
induced to make it by the undue influence of others.
court ordered the will admitted to probate.

J. R. Mathews and *R. E. Bundy,* for the appellant.

For the respondent there was a brief by *Freeman & F*
man, and oral argument by *C. E. Freeman.*

SIEBECKER, J. It is argued that the trial court's find
that the testatrix had mental capacity to make the wil
against the clear preponderance of the evidence. In pass
on this question the fact that the trial court had the fullest
portunity to observe the witnesses while testifying and to
proper weight to their evidence must not be overlooked.
conclusions, therefore, are of weight and cannot be distu
unless it is apparent from an examination of the evid
that they are against the clear preponderance of the evide
It is strenuously asserted that the evidence clearly shows
Mrs. Mullan was so weak mentally at the time the will
made that she was incapable of understanding and com
hending the nature of the act, the extent of the disposi
made by the will, who were the natural objects of her bou
and the manner in which she desired that disposition sh
be effected. Reliance for this contention rests mainly on
evidence tending to show the change in her physical he
and strength, her changed mental attitude, and her unsuc
ful administration of her business and financial affairs in
later period of her life. It is undisputed that she had
an intelligent person of strong will and fair business ab
in the prime of her life. She had always evinced the
acteristics of independence and self-reliance in the con
of her affairs. An examination of the evidence disc
that these characteristics were impaired in her old age,
there was not such a degree of impairment of her facu
and abilities in comprehending and understanding her

ss affairs as constitutes mental incompetency to make a ll. It is shown that she still possessed mental powers suf- ient to call to mind the particulars of her business and the fairs of life, and to hold them in mind for such a time as perceive and understand their obvious relations and to rm a rational judgment in relation to them. This condi- n of her mental faculties evinced sufficient mental capacity enable her to make a will.

As to whether the testatrix was unduly influenced to make is will, we are persuaded that the trial court in its opinion rrectly expresses the state of the evidence on this issue. He und that the evidence was devoid of anything showing any licitation by *Crandall* or his wife or any other person for e making of this will, that the evidence is well-nigh barren facts tending to show that she was susceptible of being in- enced in dealing with her property, and that her acts and nduct refute the claim that she was susceptible to the in- ence of others in these matters. Her attitude toward the randalls and others dealing with her was that of a self- lled and self-reliant person. While the transaction of the ttlement with her tenant and the giving of the powers of at- rney to *Crandall* and Boardman show a want of good busi- ss management and may indicate a want of fair dealing th her by all of these persons, it is not sufficient to show at she was in fact unduly influenced by them to make this ll. We must hold that the trial court's conclusion on this estion cannot be disturbed by this court, and that the judg- ent admitting the will to probate was correct.

By the Court.—Judgment affirmed

VETTER, Administrator, Appellant, vs. SOUTHERN WIS
SIN RAILWAY COMPANY, Respondent.

September 16—October 5, 1909.

*Street railways: Collision with vehicle near track: Duty to look
listen for car: Contributory negligence: Question of law: Sp
verdict: Inconsistent findings: Changing answer.*

1. The question of contributory negligence is or may be a m
question of law and fact, but when facts are found in a sp
verdict showing contributory negligence without room for
flicting inferences, the conclusion of law necessarily fol
and the court may properly change the answer to another
tion whereby the jury finds that there was no contributory
ligence.
2. In an action for death of a person caused by collision betwee
wagon and a street car which came from behind, findings
special verdict, supported by the evidence, that before his
entered upon the track or went so near that the car coul
pass without striking his wagon the deceased did not loo
listen for the approach of the car from the rear, and tha
the exercise of ordinary care and prudence he could have
the car in time to have avoided the accident, establish the
tributory negligence of the deceased and are not nullified
further finding that he was not guilty of such negligence.
3. A person driving on the highway is bound to look and liste
the approach of a street car before going so near the track
a car cannot pass without striking his wagon; and it is i
terial in such a case whether or not he intends to drive up
across the track.

APPEAL from a judgment of the circuit court for D
county: JAMES O'NEILL, Judge. *Affirmed.*

This action was brought by the administrator to rec
damages for the alleged negligence of the defendant cau
the death of plaintiff's intestate. The negligence allege
in the careless operation of defendant's car and the fai
to warn the deceased of the approach of said car. The
swer denies generally the allegations of the complaint an
leges contributory negligence of plaintiff's intestate.

se was submitted to the jury and the following verdict re-rned:

"(1) At what rate of speed was defendant's car moving at e time of the accident? *A.* Eight miles per hour.

"(2) At what rate of speed was the deceased driving his am at the time of the accident? *A.* Three and one-half iles per hour.

"(3) After turning from Emerald street into Park street d while approaching the place of accident, was the bell or ng of the defendant's car sounded? *A.* Yes.

"(4) Did the motorman try to stop the car as soon as it as apparent that there might be a collision? *A.* Yes.

"(5) Was the motorman guilty of any want of ordinary re in the operation of his car at the time of the accident? Yes.

"(6) If you answer the last question 'Yes,' then was such ant of ordinary care the proximate cause of the death of the ceased? *A.* Yes.

"(7) Did the deceased, before his team entered upon the ack or went so near it that the car could not pass him with-t hitting his wagon, look and listen for the approach of a r from the rear? *A.* No.

"(8) Could the deceased, in the exercise of ordinary care d prudence, have seen the approaching car in time to have oided the accident? *A.* Yes.

"(9) Was the deceased guilty of any want of ordinary care ich contributed to the accident? *A.* No.

"(10) In case the court should be of the opinion that the aintiff is entitled to recover, at what sum do you assess his mages? *A.* $6,000."

Before the special verdict was submitted to the jury plaint-objected to questions Nos. 1, 2, 4, and 7 for the reason that ey did not call for a response to any issue raised by the eadings, but called for a finding of an evidentiary char-ter, and also requested the court to submit a question, to be mbered 3½, as follows: "If your answer to the third ques-n is 'Yes,' then what distance was the motorman from de-ased's vehicle at the time the bell or gong was sounded?"

And also requested that the court substitute for que
No. 7 two questions as follows:

"No. 7. Was deceased, just before the accident, inter
to drive upon or across the track of the defendant?

"No. 7½. If you answer the last question 'Yes,' ther
deceased, before nearing or entering upon said track,
and listen for the approach of a car from the rear?"—

which requests were denied and due exceptions taken.

The usual motions were made for judgment on the ve
and to change the answers to questions in the verdict.
court changed the answer "Yes" to question No. 5 to "
and changed the answer "No" to the ninth question to "
and granted the defendant's motion for judgment on the
dict dismissing the complaint. Plaintiff moved for a
trial, which was denied, and judgment was rendered fo
defendant dismissing the complaint, from which this ap
was taken.

For the appellant there was a brief by *Miner & Elver*,
oral argument by *F. M. Miner.*

For the respondent there was a brief by *Jones & Schub*
and oral argument by *B. W. Jones.*

KERWIN, J. The accident complained of occurred
South Park street in the city of Madison, between Erin s
and the city limits. South Park street is a macadam
street with cement curbs, practically level, and running
northerly and southerly direction. It is thirty-six feet
from curb to curb, with a street-car track in the center a
space of fifteen and one-half feet between the rail and
curb. Commencing at a point about seventy-five feet
the city limits the track of the defendant begins to curv
make the turn onto Oregon road, somewhat narrowing
space between the rail and the east curb of the street, so
at the city limits this space is only about nine feet e
inches wide. Erin and Emerald streets meet South

eet at right angles. The block between Erin and Emerald eets is about 316 feet long, and the block between Erin eet and the city limits is 162 feet. Defendant's street-car ck runs on Emerald street, turns on South Park street, l runs southerly on Oregon road. The greater part of the ck between Erin and Emerald streets is vacant and prac-ally unobstructed, so that one driving along South Park eet between Emerald and Erin streets can look for some tance up Emerald street.

On the day in question, about 3 o'clock, the deceased was ving a team of horses attached to a broad-tired lumber gon with a box thereon south along the east side of the eet between Emerald street and the city limits, sitting on igh seat, with the reins around his body over his shoulder. e street between him and the city limits, as well as between n and Emerald street, was unobstructed. While thus driv-his team, one of the defendant's cars turned from Emer-street onto South Park street. There is evidence tending show that when the car was within less than thirty feet of eased he drove onto or close to the track and directly out in, but not soon enough to prevent a collision between the d wheel of his wagon and defendant's car, which collision duced the injury complained of.

The jury found by their answers to the seventh and eighth stions that before deceased's team entered upon the track went so near that the car could not pass without striking wagon, he did not look and listen for the approach of a from the rear, and also that he could, by the exercise of inary care and prudence, have seen the approaching car time to have avoided the accident. These findings are ly supported by the evidence and entitle the defendant to gment on the verdict unless their effect be nullified by the th finding of the special verdict, which finds that the de-sed was not guilty of any want of ordinary care which tributed to the accident. *Dummer v. Milwaukee E. R. &*

L. Co. 108 Wis. 589, 84 N. W. 853; *Tesch v. Milwau*
R. & L. Co. 108 Wis. 593, 84 N. W. 823; *Morice v*
waukee E. R. & L. Co. 129 Wis. 529, 109 N. W.
Cawley v. La Crosse City R. Co. 101 Wis. 145, 77
179; *Hogan v. Winnebago T. Co.* 121 Wis. 123, 98
928; *Hanlon v. Milwaukee E. R. & L. Co.* 118 Wis. 2
N. W. 100; *Stafford v. Chippewa Valley E. R. Co.* 11
331, 85 N. W. 1036; *McClellan v. Chippewa Valley*
Co. 110 Wis. 326, 85 N. W. 1018.

The court changed the answer to the ninth question
"No" to "Yes," and this ruling is complained of. T
swers of the jury to the seventh and eighth questions
the facts which established the contributory negligence
plaintiff. It is true that contributory negligence is or n
a mixed question of law and fact, but where the fac
found or are undisputed showing contributory negligen
there is no room for conflicting inferences upon the
lished facts, then the conclusion of law necessarily fo
The court was therefore clearly right in changing the a
to the ninth question to correspond with the facts found
jury in the seventh and eighth questions. *Wanzer v.*
pewa Valley E. R. Co. 108 Wis. 319, 84 N. W. 423; *St.*
B. Co. v. Kemp, 125 Wis. 138, 103 N. W. 259; *Hog*
C., M. & St. P. R. Co. 59 Wis. 139, 17 N. W. 632; *M*
v. Bishop, 59 Wis. 417, 18 N. W. 337; *Fick v. C. &*
R. Co. 68 Wis. 469, 32 N. W. 527; *Rowley v. C., M. &*
R. Co. 135 Wis. 208, 115 N. W. 865; *Hogan v. Winn*
T. Co. 121 Wis. 123, 98 N. W. 928; *Rahr v. Manches*
A. Co. 93 Wis. 355, 67 N. W. 725; *Krause v. Busacke*
Wis. 350, 81 N. W. 406.

Error is assigned because of refusal to submit the f
ing question in lieu of question No. 7 submitted by the

"Was the deceased just before the accident intendi
drive upon or across the track of the defendant? If y
swer such question 'Yes,' then did the deceased, before
ing or entering upon the track, look and listen for th
proach of the car from the rear?"

We think there was no error in the refusal to submit this estion. The fact that the deceased was within the zone danger when struck was undisputed, and he was bound to k and listen before entering the place of danger, and it s entirely unnecessary to submit to the jury what the de- ased was intending to do just before the accident.

Some criticism is made upon the instructions and failure instruct respecting contributory negligence, but we find no judicial error in this regard. The facts constituting con- butory negligence were fairly submitted to the jury and nd against the plaintiff. Therefore the defendant was itled to judgment.

It follows that the judgment must be affirmed.

By the Court.—The judgment of the court below is af- med.

ATE EX REL. WAGNER, Appellant, vs. DAHL, State Treasurer, Respondent.

September 17—October 5, 1909.

cers: Vested rights: Power of removal: Review by courts: Civil service law construed: Presumption as to obedience to laws: Mandamus: *Exercise of discretion: Costs.*

Where no definite term of office is fixed by law, the power to remove an incumbent is incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary.

An office is not regarded as property, nor is the right to hold office a vested one.

The power of amotion from office is not a judicial but an administrative power, though it be exercised in a judicial manner.

Sec. 22, ch. 363, Laws of 1905, provides that certain employees in the civil service of the state shall not be removed or discharged except for just cause, vests the power of removal for such cause in the appointing officer, and makes no provision for any review of his action by any other body or tribunal. *Held*, that where an appointing officer in removing an employee acted within his jurisdiction, *i. e.* when the cause assigned is a "just cause"

within the meaning of the statute, and there is nothing t
that he acted arbitrarily or in bad faith, the courts w
review his decision as to the fact of the existence of such

5. The presumption is that public officers will obey the laws a
wantonly or criminally violate them.

6. *Mandamus* will not lie to control or review the exercise
discretion of any court, body, or officer when the act perf
is judicial or *quasi*-judicial; although it may be invoked t
pel the exercise of such discretion.

7. Witness fees paid to jurors for attendance upon the hearin
motion for a new trial, which was based in part on allege
conduct of one of the jurors, are *held* to have been prope
lowed in the taxation of costs.

APPEAL from a judgment of the circuit court for
county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The relator was employed as bookkeeper in the offi
the state treasurer and was discharged from his employ
by that officer. Incompetency and insubordination wer
causes assigned for his removal. Relator procured a
ternative writ of *mandamus* ordering the defendant to
state him in his employment or show cause why he shoul
be reinstated. Such writ was granted on a petition in w
the relator set forth, among other things, that he was ne
incompetent nor insubordinate. The defendant, by h
turn to the writ, justified his action on the grounds s
The issues made up by the petition for the writ and th
turn and the answer thereto were submitted to a jury fo
termination. The jury found that the relator was inco
tent and that he did not perform all the lawful direc
given him by his superiors in the office of the state treas
Judgment was entered on such verdict in favor of th
fendant. To review alleged errors in the trial of the a
the relator brings this appeal.

For the appellant there was a brief by *Miner & Elver*
oral argument by *E. T. Elver.*

For the respondent there was a brief by *Jones & Schul*
and oral argument by *B. W. Jones.*

BARNES, J. It is a well-nigh universal rule that where no inite term of office is fixed by law the power to remove an umbent is an incident to the power to appoint, in the ab-ce of some constitutional or statutory provision to the con-ry. *Ex parte Hennen,* 13 Pet. 230; *Parsons v. U. S.* 167 S. 324, 17 Sup. Ct. 880; and collection of cases in 37 nt. Dig., title "Officers," § 9, and in 29 Cyc., same title, 71, note 72. Our law does not regard an office as a prop-y right. Neither is the right to hold office a vested one. *te ex rel. Starkweather v. Superior,* 90 Wis. 612, 619, 64 W. 304; *State ex rel. Cook v. Houser,* 122 Wis. 534, 603, 0 N. W. 964. The power of amotion from office is not a licial power, but is an administrative one, though it be ex-ised in a judicial manner. *State ex rel. Starkweather v. perior, supra; State ex rel. Cook v. Houser, supra; Nehr-y v. State ex rel. Thal,* 112 Wis. 637, 645, 88 N. W. 610. It is clear that the limitations on the power of removal by treasurer, if they exist, must be found in some statute or tutes of the state, and the only one which it is claimed af-ts the question is sec. 22, ch. 363, Laws of 1905, which ds as follows:

"No subordinate or employee in the competitive class, non-mpetitive class, or the labor class of the civil service of the te, who shall have been appointed under the provisions of s act, or the rules made pursuant thereto, shall be removed, pended for more than fifteen days, discharged or reduced pay or position, except for just cause, which shall not be gious or political. In all cases of removal the appointing cer shall, at the time of such action, furnish to the sub-inate his reasons for the same and allow him a reasonable e in which to make an explanation. The reasons for re-val and the answer thereto shall be filed in writing with commission."

It will be observed that the treasurer, under the provisions the law quoted, might not remove a subordinate except just cause and that such cause should not be religious or

political. The statute makes no provision for any revie
any other body or tribunal, of the action of an appointi
ficer in removing a subordinate. The important questi
the case, therefore, is the determination of how far a
what extent the courts have authority or jurisdiction
view the act complained of by the relator.

In *State ex rel. Gill v. Watertown,* 9 Wis. 254, the s
under consideration authorized the common council c
city to remove certain officers for "due cause." No pro
was made for an appeal from or review of the decision
common council. It was held that what constitute
cause was a question of law to be determined by the c
but that the discretion vested in and exercised by such a
or tribunal would not be controlled by *mandamus.* In
words, it was held that the courts would decide whethe
cause assigned for removal was "due cause" within the
ing of the law, but would not determine whether the c
was right or wrong in its conclusions upon the facts th
cause assigned for removal in fact existed.

State ex rel. Kennedy v. McGarry, 21 Wis. 496, inv
the removal of an inspector of the house of correction b
board of supervisors of Milwaukee county. The statu
thorized the removal for "incompetency, improper co
or other cause satisfactory to said board." The reso
removing the inspector recited that he was removed fo
competency, improper conduct, and disobedience of t
ders of the board." No provision was made in the law
review of the decision of the county board. It was
(1) that the power of the board to discharge was ab
and its determination was final when acting within the
of its power; (2) that if the board should attempt t
charge for a cause not recognized by law and not aff
the competency or the fitness of the employee, such
would be an excess of power and not a removal unde
statute, and would be equivalent to a removal without ca

nere arbitrary removal not warranted by statute; (3) that
ien a cause recognized by statute is assigned, the power to
termine whether it exists or not is vested exclusively in the
ard, and its decision on the facts cannot be reviewed by
e courts; (4) that the only question for judicial cogni-
nce was whether the cause assigned for removal was one for
iich removal might be made under the statute.

State ex rel. Willis v. Prince, 45 Wis. 610, involved the re-
oval of the county clerk of Ashland county under a statute
ec. 6, ch. 14, R. S. 1858) which authorized the county
ard to remove such an officer "when, in their opinion, he is
competent to execute properly the duties of his office, or
ien, on charges and evidence, it shall appear to said board
at he has been guilty of official misconduct, or habitual or
lful neglect of duty, if, in the opinion of said board, such
isconduct or neglect shall be a sufficient cause for removal."
ie court said that the statute gave a wide discretion to
ards of supervisors, which "will not be revised or controlled
cept in most clear and conclusive cases of abuse." The
oceeding was one of *quo warranto,* and the court further
ld that the only questions it would consider were: "Had
e board of supervisors jurisdiction, and did they make the
oper order and a final adjudication in the case, and were
e records produced sufficient evidence of both?" This case
an extreme one in view of the provisions of ch. 163, Laws
1869, which gave the county clerk a right to appeal from
e order removing him, and which seemed to contemplate
at he should have a trial *de novo* in court.

In *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W.
4, the construction of sec. 35, Stats. (1898), was involved.
the event of two conventions of the same party being held,
e secretary of state was required to give preference in des-
nation on the official ballot to the nominees certified by the
ate central committee. The statute did not provide for any
view of the action of such committee in making its certi-

fication. The right of the court to review the decision committee was combated, and it was held that where right is created by statute and the statute provides a m by special tribunal for the enforcement or protection of right, and makes no provision for a review of the decisi such tribunal, the remedy given is exclusive, provide tribunal acts within its jurisdiction. Op. Justice M ALL, page 570 of 122 Wis. (100 N. W. 975), and present chief justice, page 595 of 122 Wis. (100 N 984). Such is the law elsewhere generally. *Miller v.* 62 Kan. 278, 62 Pac. 664; *Chapman v. Miller,* 52 Ob 166, 39 N. E. 24; *People ex rel. Ward v. Roosevelt* N. Y. 369, 45 N. E. 840; *People ex rel. Lowry v. D Court,* 32 Colo. 15, 74 Pac. 896; *State ex rel. Brewer bay,* 82 Miss. 559, 35 South. 153; *State ex rel. Yates v. tenden,* 164 Mo. 237, 64 S. W. 162.

We have in this case a right created by statute by certain state employees may not be discharged except fo cause, and the power of removal for such cause is ves the appointing officer, with no provision in the law f viewing his decision, so that the situation is similar t before the court in *State ex rel. Cook v. Houser, supra*

The instances are numerous where public officers, boards, and nonjudicial bodies are required, in the per ance of their duties, to pass upon and decide questions o Various state officers, boards of review, commissioners i ing out highways, the board of dental examiners, the bo control, the board of regents, and numerous other ki bodies that might be mentioned fall within the category the absence of a statute giving the right to review on th its, errors in judgment committed by such persons or will not be reviewed by the courts. The ultimate decis questions of fact must rest somewhere, and, when the tion presented is one pertaining to legislative rights and leges, the decision of the special tribunal appointed to

e question is final, if it acts within its jurisdiction and not bitrarily, and no review is provided for. *State ex rel. Cof-y v. Chittenden,* 112 Wis. 569, 88 N. W. 587; *State ex rel. ilas v. Wharton,* 117 Wis. 558, 94 N. W. 359; *State ex rel. ugusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex l. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex l. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 948. Moreover, the cases hold that *mandamus* will not lie control or review the exercise of the discretion of any court, dy, or officer when the act performed is judicial or *quasi*-dicial. While *mandamus* may be invoked to compel the ercise of the discretion vested, it cannot compel such dis-etion to be exercised in any particular way. *State ex rel. ericke v. Ahnapee,* 99 Wis. 322, 326, 74 N. W. 783; *State rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 622, 79 . W. 1081; *State ex rel. Court of Honor v. Giljohann,* 111 is. 377, 386, 87 N. W. 245; *State ex rel. Coffey v. Chitten-n,* 112 Wis. 569, 574, 88 N. W. 587; *State ex rel. Ginn v. ilson,* 121 Wis. 523, 526, 99 N. W. 336; *State ex rel. Ru-lph v. Hutchinson,* 134 Wis. 283, 287, 114 N. W. 453; *ate ex rel. Vanderwall v. Mayor, etc.* 134 Wis. 437, 442, 4 N. W. 802; *State ex rel. Davern v. Rose, post,* p. 360, 2 N. W. 751.

We can see nothing in the civil service law that would war-nt giving it any other or different construction from that most uniformly given to other acts involving situations simi-r to the one presently under consideration. The purpose the legislature in passing the act was apparent. We do not rceive how the conclusion reached will operate to defeat impair that purpose. It is not to be presumed that officers whom the people of the state have intrusted important pub-functions will violate their oaths of office and become per-rers because they may want to remove one employee to ake place for another. In case of removal the right of se-ction is ordinarily limited to choosing a successor from one

of three names certified by the civil service commission. presumption is that public officers will obey the laws an wantonly and criminally violate them, and the legisl may well have had in mind the advisability of placin absolute power of discharge for just cause in the heads partments, so that a high degree of efficiency and disci might be maintained and the public business might be acted with accuracy and with reasonable promptness. causes for removal assigned by the state treasurer in the ent case were just causes for removal within the me of sec. 22, ch. 363, Laws of 1905. The treasurer acted w his jurisdiction in making the removal for the cause spec and there is nothing to show that he acted arbitrarily, or wise than in perfect good faith, in making it. Wheth was right or wrong in reaching the conclusion which h on the facts is not a question for the courts to decide. decision of that question has, wisely we think, been left the treasurer and not with the courts. Indeed, the qu discussed has been so frequently decided that a mere ci of the authorities should suffice.

It follows that the motion of the defendant to take th from the jury and dismiss the action should have granted. This view of the case renders the errors compl of on the trial immaterial with one exception. Objectio made to the allowance of witness fees paid two j amounting to $6.60, for attendance upon the hearing motion for a new trial, which was in part based on a misconduct of one of the jurors. We think the items properly taxed and that the judgment appealed from i rect.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

OLSON, Respondent, vs. UNITED STATES SUGAR COMPANY, Appellant.

September 17—October 5, 1909.

Costs: Statute construed.

That part of subd. 6, sec. 2918, Stats. (1898), allowing costs to the plaintiff in an action on contract when he shall recover $100 or more, is not a qualification or repeal of subd. 7, although it was originally enacted later than subd. 7 and overlaps the ground covered thereby; and in a case coming within the terms of subd. 7, where the recovery was more than $50 but less than $100, plaintiff was entitled to costs.

APPEAL from a judgment of the circuit court for Dane ounty: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action on contract wherein a duly verified complaint al-eged a liability of $236. Judgment was recovered for only 93.92 damages. Costs were taxed in favor of plaintiff gainst due objection and exception by the defendant, and in-luded in the judgment. From the portion of the judgment warding costs defendant brings this appeal.

For the appellant there was a brief by *Aylward, Davies & Olbrich,* and oral argument by *Carl Hill.*

For the respondent there was a brief by *Murphy, Kroncke & Sauthoff,* and oral argument by *George Kroncke.*

DODGE, J. The allowance of costs to the plaintiff is very learly authorized by the words of subd. 7, sec. 2918, Stats. 1898):

"In an action on contract when a justice of the peace has urisdiction wherein the amount claimed by the plaintiff in is complaint duly verified shall exceed the sum of two hun-red dollars, but in such cases the plaintiff shall recover only uch taxable costs as the court in its discretion shall allow, when the recovery shall be less than fifty dollars."

This appellant concedes, but urges that because the l
lature in 1881, while said subd. 7 was in force, enacte
amendment to subd. 6 of said section allowing costs to
plaintiff "in an action on contract when the plaintiff sha
cover $100 or more," this is a qualification of subd. 7.
qualification at all, it is a complete repeal; for it cover
whole ground, and subd. 7 serves no purpose. We are
vinced, however, that no such legislative purpose exi
The statute as it existed in 1881, when the addition to sul
was made, allowed costs to plaintiff: (subd. 3) In the
tions in which a justice's court has no jurisdiction; (subd
In an action on contract wherein real estate shall be atta
at the commencement thereof, *without regard to the am
recovered;* and (subd. 7) In an action believed to be be
the jurisdiction of the justice of the peace, but on trial fo
to fall within it. Evidently the legislature became convi
that another class of cases should be added to this, nam
in all contract cases in which $100 or more should be
covered. This is the clear significance of the words, and
we think to have been the legislative intention. There ar
words, by negation or otherwise, in the amendment to
cate that it controls or restrains any of the other sections,
when in 1898 the entire revision of the statutes was ena
the class provided by subd. 7 and the class brought
subd. 6 by this amendment were both preserved in the sta
The fact that the two subdivisions overlap is of no sig
icance. That is the characteristic of several of the sub
sions in sec. 2918, and it is no good ground for refusing
allowed by one of those subdivisions that they may u
some circumstances be allowed by the words of another.
subd. 3 allows costs in actions of which a justice of the p
has no jurisdiction. Subd. 4 allows costs in libel and sla
actions, amongst others. In case of a recovery beyond $5
matters not to which of these subdivisions the plaintiff's r
to costs is ascribed.

Appellant urges upon our notice two cases, decided s

he amendment of 1881, in which, as he says, the supreme ourt tested the right to costs by the new words of subd. 6 nd did not mention subd. 7. But an examination discloses hat neither of those cases was within the description of ubd. 7, and any right to costs therein must have been meas-red by subd. 6. Thus, in *Field v. Elroy,* 99 Wis. 412, 75 N. W. 68, the complaint claimed $38.50 and the recovery was or $23.10, so that of course it could not fall within the de-cription of subd. 7. Again, in *Montgomery v. Am. Cent. ns. Co.* 108 Wis. 146, 84 N. W. 175, the recovery was some 400, and therefore it was not an action on contract of which justice of the peace had jurisdiction, and right to costs could ot rest upon subd. 7, while it might rest on subd. 6, because he recovery was more than $100, or might have rested on ubd. 3, because the action was not within the jurisdiction of e justice's court. We find nothing in these cases to in any ise prevent the applicability of subd. 7 to the present ac-on.

By the Court.—Judgment affirmed.

IPER and others, Appellants, vs. CITY OF MADISON, Respondent.

September 17—October 5, 1909.

unicipal corporations: Operation of waterworks: Liability for negligence of employees.

In selling and distributing water to its citizens by means of a system of waterworks a city is acting not in its governmental but in its private or proprietary capacity, and is liable in damages for negligence of its agents and servants in the conduct of such business.

The fact that the city may also use the waterworks for protection against fire does not relieve it from liability for negligent acts of its servants or agents in the conduct of the business, except for such acts as are performed by them in the actual work incident to extinguishing fires.

APPEAL from a judgment of the circuit court for
county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The city of *Madison,* being authorized to maintain an
erate a system of waterworks, built its system in
About 1890 a water tower was constructed on Washi
avenue. It is claimed that this tower was chiefly constr
to equalize the pressure. As originally planned, the co
tion between the pipes of the waterworks system and the
in the water tower was controlled by a valve located i
the base of the tower. In time the dampness and the
ping water rusted the bearings and it became impossib
operate the valve. Attempts to remedy the matter wer
successful, and in 1891, upon the advice of an exper
draulic engineer, the valve at the base of the tower wa
continued and a new valve to control the water supply t
tank in the tower was placed at the junction of the su
pipe for the tank and the main pipe line at the juncti
Pinckney street and Washington avenue about a block
the tower. Plaintiffs conducted a grocery on Washi
avenue in a building located between the valve at the
tion of Washington avenue and Pinckney street and the
tower, and stored part of their stock of groceries in the
ment of this building. About 7:30 in the morning of
ary 17, 1907, plaintiffs observed that water was flowing
the basement, presumably from a broken water pipe.
officials of the waterworks department were notified, a
rapidly as possible employees cut off the supply of water
the pipes in that section of the city. The valve at the
tion of Pinckney street and Washington avenue, contr
the supply of water to the tank in the water tower, wa
closed. This work took more than two hours and did no
the flow of water into plaintiffs' basement. A small
pipe from the tower tank was then opened and with th
appearance of the water from the tank the flow of wate
plaintiffs' basement ceased. Considerable damage was

o plaintiffs' stock of groceries by the water and they bring his action to recover for the damage suffered. Subsequent nvestigation showed that the ten-inch pipe supplying the ank in the water tower had broken. On the trial in the cir- uit court of the action for the recovery of the damages suf- ered, the jury were instructed as to the law of negligence, nd were informed that if city authorities in charge of the vater department acted upon the advice of men skilled in the vork in question, and if the city officials in good faith and in eliance upon the advice of such experts in waterworks con- truction had constructed a waterworks system according to heir best judgment, then defects in the construction became nere errors in judgment and the city would be relieved from iability for any damages resulting therefrom. Under the nstructions of the court the jury found that the defendant vas not guilty of any want of ordinary care in failing to keep he valve in the base of the water tower in such condition that t could be used to shut off the water from the tower. The ury also found the amount of the damages sustained by the laintiffs. The court awarded judgment in favor of the de- endant for its costs. This is an appeal from such judgment.

For the appellants there were briefs by *Gilbert, Jackson & Ela,* and oral argument by *Emerson Ela.*

For the respondent there was a brief by *John A. Aylward,* ity attorney, and *Aylward, Davies & Olbrich,* of counsel, nd oral argument by *J. E. Davies.*

Siebecker, J. Under legislative authority the city has oluntarily constructed a system of waterworks for public and rivate use. The revenue derived from sales of water for pri- ate use is applied to the cost of construction, operation, and naintenance of the waterworks. The business is in charge f a board of commissioners, who employ a superintendent nd such other agents and servants as are required for the onduct of this part of the municipal business. The plaint-

iffs bring this action to recover damages to their pro
which they allege were caused by the negligence of the
through its agents and servants employed by the city in
ducting the business of the waterworks department. U
the alleged facts the employees in charge of this muni
department represent the city and act for it. The erro
signed involve an inquiry as to the extent to which the
is responsible for the acts of its agents and servants i
conduct of this municipal enterprise.

In his treatise on the Law of Municipal Corporations
Dillon states:

"Municipal corporations . . . possess a double ch
ter: the one *governmental, legislative,* or *public;* the othe
a sense, *proprietary* or *private.* . . . *In its government*
public character the corporation is made, by the state, o
its instruments, or the local depositary of certain limited
prescribed political powers, to be exercised for the public
on behalf of the state rather than for itself. . . . But i
proprietary or private character the theory is that the po
are supposed not to be conferred, primarily or chiefly,
considerations connected with the government of the sta
large, but for the private advantage of the compact
munity which is incorporated as a distinct *legal person*
or *corporate individual;* and as to such powers, and to
erty acquired thereunder, and contracts made with refe
thereto, the corporation is to be regarded *quoad hoc* as a
vate corporation, or at least not public in the sense tha
power of the legislature over it or the rights represente
it is omnipotent." 1 Dill. Mun. Corp. § 66 (39). *Hay*
Oshkosh, 33 Wis. 314; *Mulcairns v. Janesville,* 67 Wis
29 N. W. 565; *Folk v. Milwaukee,* 108 Wis. 359, 84 N
420.

The function of a city in selling and distributing wat
its citizens is of a private nature, voluntarily assumed
for the advantage of the people of the city. Responsib
for the acts of persons representing it in such a business
upon the city through the relation of master and servant,

e maxim of *respondeat superior* applies. Whenever this re-
ion is established the city is liable in damages for the neg-
ence of its agents and servants in the conduct of such busi-
ss. The following adjudications uphold this liability upon
e ground that the city in conducting such a business is act-
g in its proprietary capacity: *Lynch v. Springfield,* 174
ass. 430, 54 N. E. 871; *Hourigan v. Norwich,* 77 Conn.
8, 59 Atl. 487; *Chicago v. Selz, Schwab & Co.* 202 Ill.
5, 67 N. E 386; *Bullmaster v. St. Joseph,* 70 Mo. App.
; *Philadelphia v. Gilmartin,* 71 Pa. St. 140.

The fact that the city may also use the waterworks for pro-
tion against fire does not relieve it from liability for neg-
ent acts of its servants or agents in the conduct of this
siness, except for such acts as are performed by them in the
tual work incident to extinguishing fires. *Chicago v. Selz,*
hwab & Co., supra.

In submitting this case to the jury the court held that in
nducting the business of distributing and selling water the
y is exercising a public function, and its officers and agents
conducting the business are in the exercise of *quasi*-judicial
thority, and if they exercise their judgment and discretion
good faith the city is not liable for damages resulting from
eir negligent acts. This was error, because the city in this
se was acting in its private or proprietary capacity, and it
therefore liable for the negligent acts of its servants or
ents. A new trial must be awarded.

By the Court.—Judgment reversed, and the cause re-
nded to the trial court for a new trial.

SWENSON, Appellant, vs. WELLS, Respondent.

September 17—October 5, 1909.

Replevin: Plaintiff not the sole owner: Abatement: Bringing ties.

1. Where in an action of replevin it appeared from the ple and from the verdict on an issue in abatement that a thi son was jointly interested with plaintiff in a written c under which the property in question was claimed by def to have been delivered to him in part payment for land, th should not have ordered the action abated, but under sec Stats. (1898), should have stayed the proceedings and o such third person brought in as a necessary party plaintif
2. Ordinarily sole ownership in the plaintiff is not essential maintenance of replevin against a stranger who has title nor right to possession, it being sufficient in such that plaintiff has an interest and is entitled to possession

APPEAL from a judgment of the circuit court for county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an action of replevin brought to recover poss of an automobile. The complaint alleges that the app was the owner and entitled to possession of it; that it the value of $1,500; that defendant in July, 1908, pret and claimed that plaintiff traded said car for sixteen Lone Rock, Wisconsin; that defendant fraudulently m resented the value of said lots; that defendant deede lots to one W. G. Walker; that plaintiff agreed to tra automobile for lots, if after examination said lots were to be as represented; that said lots were found not as sented; and that defendant took the automobile wron and unlawfully from plaintiff. The complaint prays f return of said property, or $1,500, its value, togethe damages.

The answer purports to set up two defenses: First, abatement as follows:

"(1) For a first defense the defendant alleges that the contract mentioned in the plaintiff's complaint was in writing nd that a copy thereof is hereto attached and made part of is defense; that the said contract was made by the plaintiff, *lbert P. Swenson,* and one W. G. Walker, jointly, by and rough one S. D. Burke, their duly authorized agent; that e said W. G. Walker is still living at Madison, in Dane unty, Wisconsin."

Second. An answer in bar, attached to which answer or cond defense was a copy of an agreement purporting to ave been made between the defendant and W. G. Walker and laintiff. This contract set up an agreement between the dendant, party of the first part, and plaintiff and W. G. Valker, parties of the second part, which provided for the le by the parties of the second part to the party of the first art of the automobile and the payment of $500 in cash in nsideration of said lots referred to in the complaint. The ntract contained other provisions ordinarily found in land ntracts and not necessary to be stated here.

The court sent the case to the jury on the answer in abatement upon the issue as to whether or not the plaintiff was the le owner, and the following question was submitted: "On ly 14, 1908, was the plaintiff the sole owner of the automobile in question?" Which question the jury answered No." Upon this finding the court ordered the action abated nd judgment was entered accordingly, from which this appeal was taken.

F. K. Shuttleworth, for the appellant.

For the respondent there was a brief by *Thomas W. King,* torney, and *Grotophorst, Evans & Thomas,* of counsel, and al argument by *E. A. Evans.*

KERWIN, J. Considerable argument is made in this case specting the question as to whether or not the answer in atement was sufficient and whether it was not waived by e answer in bar. We shall spend no time on this point,

because we think it clear, under the provisions of sec. Stats. (1898), that the court should not have ordered th tion abated, even conceding, for the purpose of the argu that the answer in abatement was sufficient and the issue erly found in favor of the defendant. Sec. 2610 pro in effect, that when a complete determination of the co versy cannot be had without the presence of other parti any persons not parties to the action have such int in the subject matter as require them to be parties for protection, the court shall order them to be brought in. think the provisions of this statute made it the duty c court, upon the determination of the issue in abate against the plaintiff, to stay proceedings in the actio order the necessary party plaintiff brought in, and not the action abated. Sec. 2610, Stats. (1898); *Shove v. S* 69 Wis. 425, 34 N. W. 392; *Carney v. Gleissner,* 62 493, 497, 22 N. W. 735; *Emerson v. Schwindt,* 108 167, 173, 84 N. W. 186; *McDougald v. New Richmo M. Co.* 125 Wis. 121, 103 N. W. 244.

It may be well to observe, in passing, that ordinaril ownership in a plaintiff suing in replevin is not essent the maintenance of the action, because he may recover, th not the sole owner, against a stranger who has neithe nor right of possession, if he has an interest and is entit possession. For example, in certain cases a tenant in mon may maintain an action in his own name to recove session of personal property from a stranger, in the al of special circumstances going to show the necessity o other party plaintiff. But in the case before us we the opinion that the court below rightly regarded the c a proper one requiring the presence of Walker as a plaintiff, upon the allegations in the pleadings and agre referred to in the answer in abatement. The court is fore of the opinion that the court below was in error in

ng the case abated; therefore the judgment must be re-ersed.

By the Court.—The judgment of the court below is re-ersed, and the cause remanded for further proceedings ac-ording to law.

SIEBECKER, J., took no part.

DRALLE, Respondent, vs. TOWN OF REEDSBURG, Appellant.

September 18—October 5, 1909.

Highways: Defects: Personal injuries: Pleading: Variance: Nature of injuries: Evidence: Opinions: Hypothetical questions: Cross-examination: Discretion: Instructions to jury: Damages for loss of time: Married women: Costs.

1. In an action for injuries caused by defect in a highway the complaint alleged that plaintiff received "permanent injuries; was rendered sick, sore, bruised, maimed, and her life endangered, and has suffered and still does suffer severe and excruciating pains." The complaint included the notice of injury served as required by sec. 1339, Stats. (1898), and stated that it set forth the injuries. This notice stated that plaintiff was thrown to the ground, "causing severe bruises to my legs and shoulders, and inflicting severe internal injuries." The claim for damages required by sec. 824, Stats. (1898), also made a part of the complaint, was for "injuries, suffering, both mentally and physically." *Held*, that the complaint, notice, and claim should be construed together as a pleading, and so construed the allegations were sufficient to permit the admission of evidence of injuries to plaintiff's side, back, and ribs, and also of an atrophy or wasting of the muscles of the back, causing curvature of the spine and having a tendency to increase.
2. A defendant who neither demands a bill of particulars nor moves to make the complaint more definite and certain cannot, by objection at the trial, exclude evidence which is comprehended within the broad generalities of the complaint.

3. The notice required by sec. 1339, Stats. (1898), need not sp
the particulars in which the party is injured nor contain
description of the injuries.
4. In an action for personal injuries, a question to an expert
ness as to how the injury affected the plaintiff was proper
word "injury" being used to designate the contusion, bruis
trauma in question, and not the invasion of legal rights w
might have occurred at the time of the accident.
5. An objection to a long hypothetical question on the ground
it does not contain all the elements of fact testified to wi
considered on appeal only so far as it specifies the facts cla
to be omitted.
6. In a hypothetical question as to whether the injury sustaine
plaintiff was a sufficient producing cause of her physical c
tion as found by the witness, it was not necessary to includ
fact that plaintiff had given birth to seven children, all of w
died in infancy or shortly thereafter.
7. It was not error to exclude the opinion of a witness as to wh
it would have been possible or practicable for plaintiff to
over a part of the highway lying outside of the traveled t
at the place of the accident, in the absence of evidence
plaintiff had an opportunity to leave the traveled track and
such knowledge of the defect therein as would require a pe
exercising ordinary care to leave the track and drive ou
thereof.
8. Where, from the questions asked, an attempt to extend a c
examination to matters not covered by the direct examina
could fairly be inferred, it was not an abuse of discretio
limit the cross-examination rather strictly.
9. An instruction that, in determining whether or not the high
was defective at the place in question, the jury should cons
the amount of labor and money which must be expended t
viate the alleged defect, and whether such expense would
excessive as to render the change impossible or impracticab
held (whether correct in law or not) to have been properl
fused as inapplicable to the facts in this case.
10. Refusal to instruct the jury that plaintiff was not entitled t
cover for loss of her time was not error in this case, in vie
other instructions given and of the fact that no claim for
recovery was made and no evidence offered on the subject.
[11. Whether, under sec. 1339, Stats. (1898), as amended by ch.
Laws of 1899, providing that a husband shall have no rig
action on account of injuries received by his wife by reaso
a defect in a highway, a wife may recover damages for lo
her time, not determined.]

12. Costs taxable for drawing a bill of exceptions should not be held to include that part thereof composed of a transcript of the reporter's notes, drawn by the reporter, for the cost of which the successful party has already been fully reimbursed by the other party.

13. Although the costs taxed for drawing a bill of exceptions may in this case have included something more than the improperly allowed costs of the reporter's transcript, this court will not count folios to determine that fact, counsel having furnished no separation or basis for separation of the items.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Modified and affirmed.*

Daniel H. Grady, for the appellant.

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

TIMLIN, J. In this action for damages resulting from a defective highway the respondent pleaded that she "was thrown violently from the said wagon and struck on the rocks hereinbefore referred to, receiving therefrom severe and, as she is informed and verily believes, permanent injuries; . . . was rendered sick, sore, bruised, maimed, and her life endangered, and she has suffered, and still does suffer, severe and excruciating pains." Attached to the complaint and made part thereof is a copy of the notice served by respondent upon the town and required by sec. 1339, Stats. (1898), in which, after describing the place where the accident happened and the nature of the defect, she says:

"Thereby throwing me out of the wagon and causing me to fall with great force upon the ground, causing severe bruises to my legs and shoulders, and inflicting severe internal injuries."

Also made part of the complaint is the claim for damages filed before the town board of audit as required by law, in which she states that she makes a claim for injuries result-

ing from a defective highway concerning which she had g
a written personal notice. She further states:

"I claim damages against the town of *Reedsburg* fo
juries, suffering, both mentally and physically, loss of
ing capacity, both past and future, loss of time, etc., exp
incurred and to be incurred for doctoring," etc.

As a witness on the trial the plaintiff offered her testi
to the effect that by the fall in question she sustained inj
to her side, ribs, and back, to which defendant objected
far as it pertained to any injuries other than those expr
mentioned in the notice of injury and the claim filed wit
town board, namely, an injury to the leg and shoulder
internal injuries. This objection was overruled. She
fered the testimony of her attending physician, who test
to an atrophy or wasting of the muscles of the back, cau
curvature of the spine and having a tendency to incr
A similar objection to the admission of this testimony
made and overruled. *Mauch v. Hartford,* 112 Wis. 40
N. W. 816; *Schmidt v. Pfeil,* 24 Wis. 452; *Delie v.*
N. W. R. Co. 51 Wis. 400, 8 N. W. 265; and a numb
cases from other courts, are cited to show error in this ru
Sec. 1339, Stats. (1898), which imposes this liability
the town, requires as a condition precedent the service
one of the town supervisors of a notice stating the place w
such damage occurred and describing generally the in
ciency or want of repair which occasioned it and that
faction therefor is claimed of such town. The statute
not require that this notice specify the particulars in w
plaintiff was injured nor that any description of her inj
be given therein.

From the excerpts quoted it will be seen that the
ments of the complaint in this respect were very broad
general, and, although the complaint incorporated therein
notice and further stated that the notice set forth the inj
of the respondent, the notice itself in this respect is

road and general. It speaks of bruises to her legs and shoulders and severe internal injuries, and the claim filed with the board of audit refers to this notice and claims damages for injuries and suffering, both mental and physical. These three papers presented together as a pleading must be construed together, and neither can be tested by any other rule than that relative to the sufficiency of pleadings. Under that rule there was sufficient in the complaint notwithstanding the exhibits attached to and incorporated therein to permit the admission of this evidence. *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377; *Delie v. C. & N. W. R. Co.* 71 Wis. 400, 8 N. W. 265. The complaint was doubtless subject to a motion to make definite and certain in this particular or the defendant could have demanded a bill of particulars, but, having waived these remedies, it could not, by objection at the trial, exclude this evidence which is comprehended within the broad generalities of the complaint.

One of the expert witnesses was asked how the injury affected respondent, and this question was allowed to be answered against objection by the appellant. From an examination of the testimony preceding the question we are inclined to agree with counsel for respondent that the word "injury" was then being used to designate the contusion, bruise, or trauma in question, and not the invasion of legal rights which might have occurred at the time of the accident. So construing this word there was no error in the ruling. The objection to a long hypothetical question on the ground that it did not include all the elements of facts testified to in the case and upon other grounds not necessary to mention was followed by a question from the court to counsel making the objection, asking counsel what facts he referred to which were not in the hypothetical question. Counsel referred to the fact of the existence of a scrofulous goiter for twelve years, but the question expressly assumed that respondent had been afflicted with goiter for a number of years and that it had increased

some from the time of the injury. Counsel also ment
the fact that plaintiff had given birth to seven childre
of whom died in infancy or shortly thereafter. This
was not necessary to be included. The objection mad
insufficient to raise any other question not already co
ered. And the same is true of the objection to the hyp
ical question propounded to Dr. Edwards. *Odegard v. I*
Wis. L. Co. 130 Wis. 659, 677, 110 N. W. 809; *Corn*
State, 104 Wis. 527, 80 N. W. 745.

Evidence that there existed a space to the right of the
eled track in the highway in question twelve feet in widt
a little higher than the traveled track was admitted, bu
court excluded evidence of a witness who was asked to
whether this was such a piece of highway as would perm
use for the driving of a vehicle outside and to the right
traveled track; also whether it was possible or practica
drive over this strip of twelve feet at the place where pla
was injured.

We do not think that any prejudicial error can be
cated upon this ruling. If the jury had before it the
tion and measurements of the traveled track and the
tunities to turn out and avoid the rock in question, they
not be aided much further by the opinion of the witness
the question asked, even if we concede that such opinions
competent. The item of evidence is quite remote, and
less coupled with proof that the plaintiff had opportun
turn out of the traveled track and such knowledge of th
fects in the traveled track as would require a person i
exercise of ordinary care to depart therefrom and trav
this strip, the opinions of a witness as to the practicabil
feasibility of so doing would be quite immaterial.

A physician called by the respondent testified that h
amined the respondent shortly after the injury and fou
atrophy of the muscles of the back or curvature of the
The court limited the cross-examination of this witness

strictly, but the questions asked were very broad, and were no doubt understood by the court to attempt to extend the cross-examination to other matters not covered by the direct examination. Whether this was intended or not the court evidently so understood, and this inference could fairly be made from the questions asked. There was no abuse of discretion in this ruling.

Error is assigned because the court refused the request of the defendant that the jury be instructed as follows:

"You are further instructed that, in determining whether or not the highway at the place in question was defective, you are to take into consideration the amount of labor and money which must necessarily be expended to obviate the condition wherein the alleged defect consists, and whether or not the same would be so excessive as to render impossible or impracticable a change of such condition."

Whether or not this was correct in law we need not determine, because there was no evidence in the case to which such instruction was applicable. And it is in itself inconsistent with the theory of the defense that there was a strip twelve feet in width to the right of the traveled track upon which the plaintiff might safely have driven. The road in question is over a hill called Buckley's Hill, and is about nine feet wide between the raised sides. The wagon track is about six feet wide. On the right hand the bank ran up four, six, or eight feet high, and on the left hand there was a bank sixteen inches to two feet high extending up and then an abrupt drop. A rock extended across the wagon track diagonally. The right wheel of the wagon would strike the rock first, and from the bottom of the rut to the top of the rock was about eight to twelve inches. To the right of the traveled track the rock projected above the sand from four to six inches and about as much on the left. This shows no situation calling for such an instruction.

The court also refused the request of the defendant that

the jury be instructed that plaintiff was not entitled t
cover for loss of time. There was no evidence offered or
subject, and, so far as the record shows, no claim made
she was entitled to recover for any such item of dam
The court did instruct the jury with reference to the fo
question of the special verdict, the form of which was: "
sum of money will compensate the plaintiff for the injur
has received?" In such instructions he told the jury to
in mind the condition of the plaintiff's health before and
the injury, the nature and extent of the injuries as disc
by the evidence, and to include compensation for the a
injury to the plaintiff's person, and for the physical and
tal pain and suffering undergone by reason of the injury
not to allow any sum for expenses incurred in the ca
medical attention of the plaintiff, and also with referen
future impairment of health.

The law as it now exists with reference to the liabili
towns—that is, sec. 1339, Stats. (1898), as amende
ch. 305, Laws of 1899— cuts off all right of action on the
of the husband on account of injuries received by the
and renders the reason given for the exclusion of such
ages in *Bading v. Milwaukee E. R. & L. Co.* 105 Wis. 48
N. W. 861, no longer appropriate. Cutting off a husb
right to recover such damages does not necessarily confer
a wife the right to recover; consequently this question i
for future consideration, and, there being no claim for
ages before the jury and no evidence to warrant such r
ery, the refusal of the requested instruction was not error
cannot say upon the evidence that the damages awarde
the jury are excessive within the rules governing the co
eration of such questions.

In the taxation of costs the respondent was permitt
tax an item for drafting the bill of exceptions used by
upon the first appeal in this case, reported at 130 Wis.
110 N. W. 210. On the reversal of that judgment th
spondent presented as an item of disbursements the

ill of the court reporter for the original and copies of the ranscript which constituted the major part of the bill of exeptions, and this expense was paid by the appellant. The lerk allowed the respondent to tax for drawing that part of he bill of exceptions so made up. Proper exception was aken to the ruling of the clerk, the matter brought for reiew before the circuit court, who by order allowed this item f costs to the respondent, and the evidence and exceptions on he taxation of costs are preserved in the bill of exceptions. The statute (sec. 2921) provides for the taxation of costs for lrawing bills of exceptions, but this cannot be held to cover . bill of exceptions or that part thereof composed of a trancript of the reporter's notes drafted by the reporter for the ost of which the respondent had theretofore been fully reimoursed by the appellant. The amount of this item, as stated n the printed case, is $146. This may include something nore than the reporter's transcript, but counsel for respondnt has furnished us no separation, or basis for separation xcept by counting folios, which we decline to do.

For this error in taxation of costs the judgment of the circuit court must be modified by striking therefrom the item of 3146 above mentioned, and, as so modified, affirmed, the costs f this court to be taxed against the respondent.

By the Court.—It is so ordered.

SHEPARD DRAINAGE DISTRICT: JOHNSON and others, Commissioners, Appellants, vs. EIMERMAN, Respondent.

September 18—October 5, 1909.

Navigable waters: Rights of the public: Artificial conditions when become natural: Destruction in drainage proceedings.

1. Evidence, stated in the opinion, *held* sufficient to sustain the finding of the trial court that a pond, created in a nonnavigable creek by the flowage from a dam across such creek, is in fact navigable.

2. The rights of the public in a small body of water, navigal fact and constituting a public highway, are as much entit protection as they would be in a more pretentious waterc
3. An artificial condition of navigability of a pond originally cr by a dam, becomes, by continuance for twenty years, a na condition.
4. Sec. 1379—28, Stats. (Laws of 1907, ch. 646), authorizing age commissioners to condemn "riparian rights, rights of age and water power," does not authorize the destructi bodies of water navigable in fact.

APPEAL from an order of the circuit court for county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an order refusing to confirm the liminary report of certain drainage commissioners the fore appointed. The commissioners reported in favor o creation of a drainage district in the towns of York and dina in Dane county, Wisconsin. The drainage system ommended by the commissioners contemplated the ren of a dam known as Marshall dam and the destruction pond created thereby known as Marshall pond. The ci court held that the pond created by the flowage of the constituted navigable waters of the state and that such w could not be destroyed under the drainage acts. The missioners appeal from such order.

For the appellants there was a brief by *Tenney, Ha Tenney,* attorneys, and a supplemental brief by *Whitehe Matheson* and *Kearney, Thompson & Myers,* of counsel, oral argument by *F. W. Hall* and *T. M. Kearney.*

Elmore T. Elver, for the respondent.

BARNES, J. The trial court held that Waterloo cre not in fact navigable, but that the pond therein created b flowage from the dam sought to be condemned is navig and that its navigability could not be destroyed under powers granted or rights conferred by ch. 419, Laws of 1 as amended by ch. 646, Laws of 1907. The evidence te

to show that the milldam in question was built nearly sixty years ago and has been maintained ever since; that the pond was about a mile and a half long, and varied in width from a few feet at the upper end to 200 or 300 feet at the lower end, and had a depth of eight feet at the dam, which gradually lessened until it did not exceed two or three feet at its upper end; that such pond covered about 150 acres; that it was navigated by rowboats; that it was used as a reserve for fire protection for the village of Marshall; that it furnished the source of supply of ice for said village and the neighborhood adjacent thereto; that it was resorted to for fishing, and that farmers in its immediate vicinity might transport their grists to the grist mill over the same if they saw fit (although no evidence was offered to show that they had done so or were ever likely to do so); and that it was used by the public for the purposes enumerated.

Slight as is the showing of navigability in this case, still we think it is sufficient to sustain the finding of the trial court that this pond is in fact navigable and is water in which the public has acquired rights, under the repeated decisions of this court. Indeed, counsel for the appellant did not assert otherwise on the oral argument. The following cases, among others which might be cited, define what constitutes the test of navigability in a stream or body of inland waters: *Whisler v. Wilkinson,* 22 Wis. 572; *Sellers v. Union L. Co.* 39 Wis. 525; *Olson v. Merrill,* 42 Wis. 203; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, 43 N. W. 660; *Falls Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 58 N. W. 257; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12. It is true that the body of water found to be navigable in this case is small, but if it is navigable in fact and constitutes a public highway the rights of the public therein are as sacred and as much entitled to protection as they would be in the case of a more pretentious watercourse.

The decision of the circuit court holding that the mil in question is navigable being warranted by the facts s in evidence, it seems to us that every claim and every tention made by appellants is settled adversely to them b decision of this court in *In re Horicon D. Dist., supra.* artificial condition originally created by the dam becam lapse of time a natural condition. *In re Horicon D. supra; Diana Shooting Club v. Lamoreux,* 114 Wis. 4 N. W. 880; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N 436; *In re Dancy D. Dist.* 129 Wis. 129, 108 N. W. *Smith v. Youmans,* 96 Wis. 103, 70 N. W. 1115; *Me Club v. Anderson,* 101 Wis. 479, 78 N. W. 185. In the *con Drainage Case* the court does not decide that the lature may not authorize the destruction of bodies of navigable in fact, but it does decide that the act we are sidering did not authorize any such destruction, and it least strongly intimated in some of the decided cases such an act could not be upheld. *In re Dancy D. supra; Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N 918. It follows that the order of the circuit court wa rect.

By the Court.—Order affirmed.

PETITION OF ROSS: BOWKER and another, Appellant SHIELDS and others, Respondents.

September 18—October 5, 1909.

Wills: Construction: Descent and distribution.

1. If a parent leaves, by will, property to one of several ch with no disposition over in the event of the termination estate, and such child dies under age, not having been m such property, though testate as regards the parent, is in as regards the child, and descends to the other children

testator, living at the death of the child, and to the issue of such as are dead, by right of representation, under subd. 5, sec. 2270, Stats. (1898).

2. A will giving to a person named "all the rest, residue, and remainder" of an estate, subject to certain bequests, does not dispose of a remainder over at the death of such person.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Proceedings for the construction of a will.

Albert Bowker died testate. His will was duly admitted to probate in the county court of Dane county, Wisconsin, May 5, 1891. He died seised of certain real estate and owner of certain personal property. After settlement of his estate there was left in the hands of the executrix for distribution $253.59. He willed all the residue of his estate, after payment of his debts and funeral expenses, to his son Albert Irwin Bowker, subject to some small bequests which have been paid. The estate was closed by a final order reciting that the deceased left surviving him six children, named, who were at the date of the order adults, and two children, *Claudia Gertrude,* aged eleven, and Albert Irwin, aged five years at such date, and his widow as his sole heirs, and decreeing as follows: The testamentary trustee is entitled to the $253.59 to be applied on the legacy of $500 to *Claudia* upon her attaining the age of eighteen years and on one to a son, *Ernest,* upon the son Albert Irwin arriving at the age of twenty-one years, provided that, in case the death of *Ernest* precedes Irwin attaining the age of twenty-one years, the former's legacy shall revert to Irwin, all as in said will provided; and in case of the death of *Claudia* under the age of eighteen years her legacy shall belong to such heirs at such age, as she would have had, had she reached that age, and the legacy to *Ernest* shall be payable to him if living at the time Albert, Jr., if living, would reach the age of twenty-one years, and if prior to such time *Ernest* shall die leaving issue of his body living at such time, his legacy shall be paid at such

time to such issue, otherwise, in case of the death of *E* before such time leaving no issue, the legacy shall fall the residuum of the estate and go to Albert or his Subject to the homestead and dower right of the widow payment of the legacies the estate was decreed to Albe residuary legatee as provided in the will.

After entry of the final order as aforesaid Albert I died under the age of twenty-one years leaving as surv his mother, *Mary,* brothers and sisters and issue of dec brothers and sisters, children and grandchildren of Alber Marion Ross, being trustee of the proceeds of a sale o real estate for Albert Irwin and his mother, after the dea the former petitioned the county court for an order dire disposition thereof. Respondents, as heirs of Albert, claimed that the property which would belong to A Irwin, if living, belonged to them under sec. 2270, S (1898); should go to the living children of Albert, Sr., the issue of his deceased children by right of represents The county court so held and on appeal to the circuit the result was the same. Judgment was rendered ac ingly.

For the appellants there was a brief by *Gilbert, Ja & Ela,* and oral argument by *Emerson Ela.*

For the respondents there was a brief by *W. A. P. M* and oral argument by *M. S. Dudgeon.*

MARSHALL, J. The question at issue on the appeal be concisely stated thus: If a person having children die tate leaving property by testamentary gift to one of with no direction for disposition thereof in case of th mination of that estate by death or otherwise, and such dies in infancy, and so, necessarily, intestate, he not h been married, does such property descend to the other dren of such person, living at the death of the first take the children of such as are dead, by right of representa

That, as held by the learned trial court, is unmistakably ruled by subd. 5, sec. 2270, Stats. (1898), in these words:

"If any person shall die leaving several children or leaving one child and the issue of one or more other children, and any such surviving child shall die under age, not having been married, all the estate that came to the deceased child by inheritance or by testamentary gift from such deceased parent and all personal property which belongs to such deceased child by reason of distribution under subd. 6 of sec. 3935 shall descend and be distributed in equal shares to the other children of the same parent and to the issue of any such other children who shall have died, by right of representation."

The statute is so plain, that it would be a waste of words to indulge in discussion for the purpose of elucidating its meaning or pointing out its application to the facts of this case, as summarized in the proposition stated.

Counsel for appellant suggest that the statute is a law of descent, which does not apply here because the property in question was disposed of by the will of Albert Bowker. True, the statute is one regulating descent and so applies wholly to intestate property. But the property in question is clearly within the statute, since, though it is testate property as regards Albert Bowker, Sr., and came to Albert Irwin by testamentary gift, it is intestate property of the latter. By the terms of the law it includes property received by a child, subsequently dying in infancy, by inheritance or testamentary gift.

Counsel is plainly in error in the claim that the remainder over after the death of Albert Irwin was disposed of by the will of his father. He did not even will the property, as suggested, to Albert Irwin and his heirs. Had he done so the term "heirs" would be referable to the section under consideration. The will gave direction to the title only till it should vest in Albert Irwin, the words being: "I give and bequeath to my son Albert Irwin all the rest, residue, and remainder of my estate, both real and personal, subject," etc., specifying the

legacies which have been paid as indicated in the staten
That left direction of the title in the circumstances whic
curred wholly as specified in the statute, as the circuit
decided.

By the Court.—Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
pellant, vs. VILLAGE OF FAIR OAKS, Respondent.

September 18—October 5, 1909.

*Railroads: Highway crossings: Maintenance: Planking: Cond
tion: Compensation: Constitutional law: Police power.*

1. Under sec. 1299*h*—1, Stats. (Laws of 1907, ch. 120),—requir
railway company at its own expense to construct, grade
maintain in safe condition for public travel the portion o
highway extending upon or across its tracks or right of w
any incorporated village, etc.,—the company must, by pla
or some equivalent therefor, adjust the surface of the hig
where it crosses the tracks substantially to a level wit
tops of the rails.
2. Where a portion of the right of way of a railway company i
demned for the purpose of extending a highway acros
tracks, the company is not entitled to be compensated fo
expense which it must incur in constructing and mainta
the crossing as required by the statute, such burden bein
posed upon it solely for the protection of the public.
3. The requirement of sec. 1299*h*—1, Stats., is a legitimate ex
of police power for the protection of the safety of the publ

APPEAL from a judgment of the circuit court for
county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Condemnation proceeding for the extension of Jac
street across the existing right of way and tracks of the
pellant. It was stipulated by the parties, and found by
court, that the diminished value of appellant's land wa
and that the cost of planking the crossing in perpetuity w

e $99. The court awarded as damages $1 and refused to llow the $99, from which refusal the railroad company rings this appeal.

The cause was submitted for the appellant on the brief of *anborn & Blake,* attorneys, and *C. H. Van Alstine,* of coun-el, and for the respondent on that of *M. B. Olbrich.*

DODGE, J. The first contention made by appellant is that ne new statute, enacted by ch. 120, Laws of 1907, added as ec. 1299*h*—1, Stats., does not require it to plank the crossing f the new street. That act provides:

"Whenever any highway in any town or incorporated vil-age, without the limits of any incorporated city, shall extend pon, over or across the tracks or right of way of any railway ompany, such railway company shall, at its own expense, onstruct, grade and maintain in safe condition for public ravel, the portion of such highway or crossing extending pon, over or across the tracks or right of way of such railway ompany."

Does this include planking the surface between and ad-oining the tracks? The affirmative was quite directly de-lared in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 97 Wis. 18, 431, 435, 72 N. W. 1118; and, while the question was ot necessarily involved in that case, the reasons there pre-ented still appear to us cogent and conclusive. The portion f the highway at the place of intersection with the tracks annot be so constructed and maintained as to be in "safe ondition for public travel" without such planking, or some quivalent therefor, as to adjust the surface substantially to level with the tops of the rails. Of course this might be ac-omplished by the use of cement or concrete, and perhaps in ome other way, but at expense probably as much or greater han the planking, and we take the practical question here in-olved to be whether planking or some equivalent is by the tatute imposed upon the company. Without it, the crossing ould be safe neither for the public travel upon the highway

nor for the uninterrupted passage of trains over it. danger to the public results not only from the presenc rails in the street, but from the probable presence of tean other obstructions upon the track so that accidents may o to trains or they may be obliged to stop. The public sa is involved both in the travel on the street and in the t of the railroad. We think the words of the statute are cl broad enough to require such adjustment of the surfa the rails as is ordinarily accomplished by planking, and obvious purpose of the act is such as to arouse belief in intention.

2. A further contention of the appellant is that, if it quired by law to incur this expense as a consequence o condemnation of a portion of its right of way for use highway, such expense is an impairment of the value o property, and therefore should be compensated in the demnation proceedings, a contention which, if the conde tion were for another railroad, finds support in *State ex Northern Pac. R. Co. v. Railroad Commission, ante,* p. 121 N. W. 919, decided so recently that the opinion was ably not brought to the attention of the circuit judge i instant case. In that opinion, however, the distinctio clearly drawn between a condemnation of the lands o railroad for the use of another and a condemnation fo uses of a public highway, with reference to those burde expense and maintenance in compliance with police re tions, resulting from the new use of that portion of plai right of way taken for the crossing. In the case of high those burdens fall purely and solely for public protection the case of condemnation for a new railroad, elements o vate profit result from the condemnation, although the not the sole reason for it, and therefore it has been held, declared in *State ex rel. Northern Pac. R. Co. v. Rai Commission, supra,* that those expenses, so far as the cast upon the plaintiff by the new crossing, should be co sated by the condemnor, if another railroad company,

n the case of the public they should not, because a mere urden of expense resulting wholly from obedience to po- ce regulations rendered necessary by the development and rowth of the community and application of governmental olicy. *State ex rel. Minneapolis v. St. Paul, M. & M. R. o.* 98 Minn. 380, 108 N. W. 261; *Chicago, M. & St. P. R. o. v. Milwaukee, supra.*

3. Upon the question whether the requirement of sec. 299*h*—1, Stats., is a legitimate exercise of police power jus- ified by considerations of protection of the safety of the ublic, *Chicago, M. & St. P. R. Co. v. Milwaukee, supra,* is nal. As there well said: "There is no distinction in prin- iple between the planking of the crossing and the mainte- ance of crossing signs, warning posts, cattle-guards, wing ences, crossing gates," and other things there mentioned. he suggestion of a distinction because the planking or its quivalent is really a part of the construction of the railroad an immaterial one. Obviously it is no more so than the onstruction of cattle-guards required by sec. 1810, Stats. 1898), and sustained as a police regulation in *Chicago, M. St. P. R. Co. v. Milwaukee, supra,* and cases there cited.

By the Court.—Judgment affirmed

WOLF and others, Respondents, vs. GREEN BAY, OSHKOSH, MADISON & SOUTHWESTERN RAILWAY COMPANY, Appellant.

September 18—October 5, 1909.

Courts: Presumption of regularity in proceedings: Appeal: Harmless error: Railroads: Condemnation of land: Determining rights of mortgagee: Damages: Evidence: Opinions: Qualification of witnesses.

1. In a proceeding in a court of general jurisdiction, where no question of want of jurisdiction is raised, it will be presumed in the absence of a contrary showing that the necessary steps were

taken for the entry of judgment, although not all such necessary to regularity appear of record.

2. An alleged irregularity in condemnation proceedings, in t order appears of record directing the clerk to enter jud will not, where no substantial rights of the appellant fected thereby, work a reversal of the judgment.
3. The fact that the rights of a mortgagee were not adjudica condemnation proceedings is not good ground for disturbi judgment on appeal, where the parties had stipulated th mortgage claim should be paid out of the amount recove
4. In proceedings to condemn a strip of land for a railro proper inquiry with reference to damages recoverable jury to plaintiff's adjoining lands, was whether such land depreciated in market value by the taking of the strip fo purpose; but it was not prejudicial error in this case to witnesses to be asked what in their opinion was the amo damage caused by the railroad cutting through plaintiff' it appearing that counsel, court, and jury all understoo the word "damage" referred to depreciation in the marke of the part of plaintiff's land not taken.
5. In condemnation proceedings witnesses who showed fami with the value of lands and the probable injury to such from division thereof by a railroad and its operation were fied to give opinion evidence on the subject.

APPEAL from a judgment of the circuit court for Sha county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is a proceeding for acquiring a strip of land acro farm of the respondents as a right of way for the app railway company. Upon the appeal from the award commissioners appointed to appraise the damages, the in the circuit court awarded the respondents $175 as the of the strip of land taken and $575 as the damages su by the remainder of respondents' farm by the taking. commissioners had awarded $103.80 as the value of the taken and $50 as the damages to the remainder of res ents' land.

Upon the trial one of the witnesses had stated that it damage to have the railroad passing through the farm, a was then asked: "*Q.* In your opinion, how much does damage amount to?" Another witness was asked: "*Q.*

in your opinion, is the amount of damage caused by the *Wisconsin & Northern* cutting through this land?" Other witnesses were asked similar questions. Objection was made to these questions on the ground that they were incompetent and immaterial and not proper questions. No specific ground for the objection was suggested to the court. Although exception was taken to the ruling of the court permitting these questions, no attempt was made on cross-examination to have the witnesses explain the grounds for their opinions or what they included in their estimates of the damages to which they had testified.

The court instructed the jury that the respondents were entitled to recover the value of the strip taken, and that the depreciation in the market value caused to the remainder of the respondents' farm by such taking and use constituted damages which they were also entitled to recover.

After the costs were taxed the clerk of the court entered judgment in favor of the respondents for the full amount found by the jury. Reference is made in the judgment to the fact that the strip taken is included in a mortgage on the lands of the respondents and that the parties had stipulated for its payment out of the damages recovered. No deduction was made in the judgment entered of the amount which had been awarded by the commissioners and which the appellant had paid into court. Respondents have filed a satisfaction for so much of the judgment as was so paid into court. This is an appeal from the judgment.

For the appellant there was a brief by *Wallrich, Dillett & Larson,* and oral argument by *A. S. Larson.*

P. J. Winter, for the respondents.

SIEBECKER, J. The objection to the entry of judgment because no order appears of record directing the clerk to enter judgment cannot prevail. This is a proceeding in a court of general jurisdiction and no question of want of jurisdiction

is raised. Under such circumstances the rule is that, tho every step necessary to regularity may not appear of rec the presumption, in the absence of a contrary showing, is the necessary steps were taken for the entry of judgm *Falkner v. Guild,* 10 Wis. 563; *In re Marchant's Estate,* Wis. 526, 99 N. W. 320. It does not appear that the all irregularity in any way affected the substantial rights of appellant. He is therefore in no position to complain. 2829, Stats. (1898).

Nor is the fact that the rights of the mortgagee in the taken were not adjudicated good ground for disturbing judgment on this appeal, for it appears that the parties stipulation agreed that the mortgage claim on the land sh be paid out of the amount recovered. If any action is quired to protect appellant as to the payment of this inc brance, it can readily be secured upon application to the c for a direction in the matter.

The objection to the opinion evidence of witnesses tifying to the damages caused to the respondents' land adj ing the strip taken is twofold in character. It is clai that the questions propounded were improper and that witnesses were not qualified to give opinions on the sub of inquiry. The appropriate and correct inquiry is whe respondents' lands adjoining the strip taken were depreci in market value by the taking of the strip. The cour submitting the issue to the jury informed them that the spondents could recover no damages for injury to lands taken, unless it appeared that they were depreciated in ma value by the taking of the strip and its use for railroad poses. The questions propounded to the witnesses were eral in form and do not specifically embody this form o quiry. It appears, however, from what took place at trial that the questions propounded comprehended this and that counsel and witnesses understood that the "damage," as employed, referred to the depreciation in

market value of that part of respondents' lands not taken. This is confirmed by appellant's counsel's omission to make any inquiry of the witnesses as to what was embraced in their opinion on the subject. His failure to pursue the matter was evidently due to the fact that counsel, court, and jury understood the witnesses were expressing their opinion of the depreciation in the market value of the lands not taken. We do not find that the irregularity complained of operated to the appellant's prejudice.

The witnesses' qualification to give opinion evidence on this subject was sufficiently shown. They showed familiarity with the value of lands and the probable injury to such lands from division by a railroad and its operation. The grounds of their opinions were sufficiently disclosed to the jury.

It is urged that the remarks of respondents' counsel to the jury were prejudicial. We have examined them and find no grounds for an inference that they in any way affected the result on the trial.

There is no reversible error in the record.

By the Court.—Judgment affirmed.

T. D. KELLOGG LUMBER & MANUFACTURING COMPANY, Appellant, vs. WEBSTER MANUFACTURING COMPANY, Respondent.

September 18—October 5, 1909.

(1-4) *Evidence: Account books: Principal and agent: Admissions of agent: Self-serving declarations: Assignor and assignee.* (5) *Appeal: Exceptions.* (6) *Tax titles: When agent may purchase principal's land.*

1. Entries in account books are not, under sec. 4187, Stats. (1898), admissible as evidence of any item of money paid at one time exceeding five dollars.
2. Unsworn statements or admissions of an agent are not evidence in favor of the principal.

3. In an action by a grantee of land upon a covenant against cumbrances to recover a sum paid in redemption of a tax tificate, declarations in a letter written by an agent of def ant, found in its files, stating that another agent had bou in the certificate in his own name and that defendant had n a draft to make up the amount thereof, were mere self-ser declarations and not admissible on behalf of defendant to s that the certificate was taken by the agent for defendant that the transaction amounted to a payment of the taxes.
4. Admissions of the agent who took the tax certificate in his name, that he took it for defendant, are not admissible aga plaintiff under the doctrine that the admissions of an assig made prior to the assignment, are admissible against the signee. Plaintiff having redeemed from the tax sale and ing sued for breach of the covenant against incumbrance not claiming as assignee of the agent.
5. Where findings necessary to support the judgment were ciently excepted to and are unsupported by competent evid the judgment will be reversed, and it is immaterial that exception to another finding was insufficient.
6. A person employed by a lumber company as superintendent in charge of its business in a county was not precluded by position from taking a certificate in his own name at a tax of the company's land, where he was not charged with the of paying the taxes nor furnished with money for that pur

APPEAL from a judgment of the circuit court for Langl county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This action was brought to recover $521.61 paid Novem 19, 1904, in redemption of a tax certificate alleged to be standing against the real estate of plaintiff, purchased f the defendant through one T. D. Kellogg. The action based upon covenants against incumbrances, and it was leged that the tax certificate was an outstanding incumbra against plaintiff's property, and before action brought plaintiff paid the amount due on the certificate to the cou clerk of Langlade county and brought this action to rec it from the defendant upon a warranty. The action tried by the court, and the court found that on the 22d of December, 1898, the defendant was the owner of the estate in question and conveyed the same by warranty d

to one Kellogg, who conveyed to the plaintiff, and that simultaneously with the delivery of said warranty deed the defendant executed and delivered to Kellogg a writing whereby it agreed to save Kellogg harmless from all tax certificates outstanding against said real estate; that in May, 1897, said lands were sold for taxes to one W. C. Weeks for the sum of $245.13 and a certificate in the usual form issued to said Weeks; that between 1892 and the date of the conveyance of the premises by defendant, Weeks was in the employ of defendant as superintendent and had charge of its business in Langlade county; that A. J. Webster was president and manager of defendant, and all transactions and communications between Weeks and the defendant were conducted on behalf of defendant by said A. J. Webster, and that said Webster died in 1903; that during the superintendency of said Weeks the defendant kept a bank account in the city of Antigo, Langlade county, and Weeks as superintendent and agent of defendant drew checks against said bank account and made drafts on the home office at Superior for the benefit of the bank account at Antigo in the name of defendant by Weeks, superintendent; that in purchasing the tax certificate Weeks acted as agent of defendant, and purchased such certificate with the money of the defendant and held it for its benefit; that in March, 1898, defendant brought an action against Langlade county, Weeks, and others to set aside the taxes for which said land was sold and for which the certificate had issued to Weeks; that the action was brought by an attorney employed on behalf of defendant by Weeks, and that said Weeks on behalf of defendant controlled said action and made all communications with the attorney so employed; that Langlade county in its answer averred that said Weeks bought and held this certificate as the agent of defendant and that his purchase of it amounted to a payment of the taxes; that this action was never brought to trial and has never been disposed of; that on February 16, 1903, said

Weeks commenced an action against the plaintiff to fore
said tax certificate pursuant to sec. 1181, Stats. (18
which action is denominated the "Weeks action;" that
after the Weeks action was begun and on February 18, 1
the plaintiff herein notified defendant in this action of
commencement of said action, and that if it did not give
matter immediate consideration it would be necessary
plaintiff to protect its interest in the action and hold
fendant for all damages; that the Weeks action rema
pending in the Langlade county circuit court until the fa
1904; that in September, 1904, the plaintiff demande
defendant that it redeem from the tax certificate in ques
so as to clear the title to the property and let the mone
main in court in lieu of the certificate lien, and told
fendant that if this were not done plaintiff would redeem
look to defendant for its damages; that in reply to this
defendant offered to assume the defense of the action, bu
fused to redeem from the certificate, and advised ag
plaintiff doing so; that immediately after redemption
plaintiff, upon stipulation between plaintiff and Weeks
Weeks action was discontinued; that at no time did
plaintiff tender defendant the defense of the Weeks actio

And as conclusions of law that the purchase by Weel
the tax certificate constituted a payment of the taxes,
that such certificate was no lien against the premises in
tion, and that the redemption by plaintiff from the tax
tificate raised no liability of defendant to plaintiff.

Judgment was entered accordingly that plaintiff
nothing and that the defendant, *Webster Manufacturing*
pany, recover from the plaintiff the costs. From the
ment entered this appeal was taken.

For the appellant there was a brief by *Finucane & Con*
and oral argument by *A. C. Conway.*

H. V. Gard, for the respondent.

KERWIN, J. The vital question for determination upon this appeal is whether the tax certificate taken in the name of Weeks was a valid lien upon the real estate conveyed to plaintiff. If so, then the plaintiff had a good cause of action against the defendant. This question turns upon whether the proof establishes that the certificate was taken by Weeks for the defendant and therefore amounted to a payment of the taxes, and whether the relation of Weeks to the defendant in the matter was such as to prevent him from taking the certificate and thereby making it a lien upon the premises. These questions involve an examination of the evidence as to whether or not it sustains the findings. Much labor has been imposed upon the court on account of the indefinite and unsatisfactory condition of the evidence. We have bestowed much labor upon the record with a view of discovering, if possible, sufficient competent evidence to support the findings in view of the well-settled doctrine of this court that, unless the clear preponderance of the evidence is against the findings, they cannot be disturbed. We have in the first place the *prima facie* case made in favor of Weeks's title by the certificate, regular upon its face, in addition to the positive evidence of Weeks that he was the absolute owner of the certificate, corroborated by Gertrude Weeks, bookkeeper. To meet this evidence the defendant attempted to make a case by statements in books of defendant kept by Weeks and his wife while in the employ of defendant, and letters and declarations written and made by agents of defendant. The defendant put in evidence, under objection, certain entries on the cash book and ledger of the defendant company, which it was claimed tended to show payment by the defendant of an amount on a tax certificate corresponding to the amount of the tax certificate in question; also a letter in the handwriting of Gertrude Weeks, and found in the files of defendant's office, referring to the fact that the land had been sold for taxes and that Weeks had bought in the certificate in his

own name in order to save interest, and stating the amount paid for the certificate, which corresponds in amount with the certificate in question, and that the defendant had made draft for $200 to make up the amount of the certificate, $245.13. The draft also was found in the files of defendant's office, and is in evidence under objection. But the difficulty with this evidence is that it was incompetent. The entries in the books were not competent because no sufficient foundation was laid for their admission under the provisions of secs. 4186, 4187, Stats. (1898), and they were not, even if regularly in evidence, proof of payment of the item $245.13, being an item exceeding $5. Sec. 4187, Stats. (1898); *Winner v. Bauman*, 28 Wis. 563; *Brown v. Warner*, 116 Wis. 358, 93 N. W. 17. The letters and entries could only be admissible, if at all, as declarations of the agents of defendant, and upon this ground defendant's counsel claims they were competent, particularly the letter written by Gertrude Weeks, heretofore referred to, respecting the payment of the $245.13 on the tax certificate. No attempt was made to prove the facts, but the letter and other declarations of the agents of defendant were offered as evidence of payment. Such evidence was merely self-serving declarations and incompetent. *Anderson v. Fetzer*, 75 Wis. 562, 44 N. W. 838; *Befay v. Wheeler*, 84 Wis. 135, 53 N. W. 1121; *Chase v. Woodruff*, 133 Wis. 555, 113 N. W. 973; *Fay v. Rankin*, 47 Wis. 400, 2 N. W. 562; *Jilsun v. Stebbins*, 41 Wis. 235. It was not shown that the letter was written or sent by Gertrude Weeks; only that it was found in the files and was in her handwriting. The unsworn statements of an agent are not evidence in favor of the principal. 16 Cyc. 1205, 1206.

It is argued, however, by respondent that the declarations were not the declarations of agents of defendant, but admissions of W. C. Weeks made through his wife and agent; but both Weeks and his wife were agents of defendant in the transactions offered as evidence. It is further argued that the

admissions of Weeks were admissible against plaintiff because plaintiff is claiming under Weeks, under the doctrine that the admissions of an assignor made prior to the assignment are admissible against the assignee; citing *McCurdy v. Rogers,* 21 Wis. 199, and *Snyder v. Jennings,* 15 Neb. 372, 19 N. W. 501. But the rule has no application here. The plaintiff is not claiming as assignee of Weeks. Its cause of action is based upon breach of warranty by defendant. An examination of the authorities cited by respondent will show that they do not support his contention. *Snyder v. Jennings, supra,* is to the point that where a grantee of land, without the knowledge or consent of his grantor, surrenders possession to an adverse claimant, he cannot thereafter maintain an action upon the covenant of warranty without alleging and proving that the title which he surrenders is paramount to the title received from his grantor. *McCurdy v. Rogers, supra,* involves the question of personal liability of an agent, and the plaintiff sued as assignee of one Lent, and it was held that the admissions of Lent made before the assignment of his claim were admissible. This is the general doctrine. 1 Greenl. Ev. (15th ed.) § 190; *Hayward R. Co. v. Duncklee,* 30 Vt. 29; *Roebke v. Andrews,* 26 Wis. 311; *Kreckeberg v. Leslie,* 111 Wis. 462, 87 N. W. 450; *Vagts v. Utman,* 125 Wis. 265, 104 N. W. 88; *Lamoreux v. Huntley,* 68 Wis. 24, 31 N. W. 331; *Griswold v. Nichols,* 126 Wis. 401, 105 N. W. 815.

Counsel for respondent frankly admits that the books were not qualified under the statute so as to be admissible in evidence, but he says they were admissible as admissions of Weeks made by his agent, Gertrude Weeks. The admissions of Weeks and Gertrude were the admissions of the agents of defendant, as we have seen; therefore were not admissible in favor of the principal. It is also insisted that there was fraud and collusion between plaintiff and Weeks established; therefore declarations of Weeks were admissible in favor of de-

fendant. The court below made no findings upon this question, and we are not able to say upon the evidence that fraud was established.

Counsel for respondent further insists that there are no sufficient exceptions to the ninth finding, to the effect that defendant kept a bank account at Antigo and that Weeks drew checks against it and made drafts, on the ground that at least three distinct propositions are embraced in this finding and that the exception to it is too general. It is at least very doubtful whether this objection may not be good as to this finding under the doctrine laid down in *Ingersoll v. Seatoft,* 111 Wis. 461, 87 N. W. 460, and other cases in this court. But even if this be so, it does not help the respondent out of the difficulty, because other findings necessary to make the defendant's case are sufficiently excepted to and are unsupported by competent evidence.

Nor do we think the proposition of respondent's counsel that Weeks could not, because of his position with the defendant, take the tax certificate in his own name is supported by the evidence. It is true, if Weeks were charged with the duty of paying the taxes and was furnished with money by defendant for that purpose he could not acquire a valid tax certificate as against defendant. *McMahon v. McGraw,* 26 Wis. 614; *Fox v. Zimmermann,* 77 Wis. 414, 46 N. W. 533; *Geisinger v. Beyl,* 80 Wis. 443, 50 N. W. 501. But in the instant case Weeks was not charged with the duty of payment of taxes. From the evidence this duty appears to have rested with A. J. Webster, president of the defendant, and the bookkeeper.

Some other grounds in addition to those considered are argued by counsel for appellant, upon which it is insisted that plaintiff was entitled to recover; but, since we have concluded to reverse the judgment upon other grounds, we shall not treat them in this opinion.

Without the incompetent evidence erroneously admitted

there is practically no evidence to support the findings upon which the judgment rests. It follows, therefore, that the judgment must be reversed.

By the Court.—The judgment is reversed, and the cause remanded with instructions to the court below to enter judgment for plaintiff, unless the court below shall in its discretion, upon proper showing, order a new trial.

EVANGELISH LUTHERISH ST. MARTINS GEMEINDE OF THE TOWN OF BELLE PLAINE, WISCONSIN, Respondent, vs. PRUESS, Appellant.

September 18—October 5, 1909.

***Subscriptions: Conditions: Acceptance: Withdrawal: Religious societies: Corporations* de facto.**

1. **A subscription for the building of a church, made upon condition that the subscriber should not be called upon for certain work and that the church corporation should accept it as being in full of his share of the expense of building, was a mere offer until accepted as stipulated.**
2. **Where no other kind of acceptance is stipulated for, a subscription may be accepted by expending money and erecting a building in accordance with the offer.**
3. **The evidence in this case is *held* not to show, as matter of law, acceptance of a subscription upon the condition stipulated, before a withdrawal thereof.**
4. **Notwithstanding informalities in its articles of incorporation, a religious society which has accepted from a member thereof a subscription to a building fund is, as to the subscriber, a corporation *de facto*.**

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Wallrich, Dillett & Larson,* and oral argument by *A. S. Larson.* They cited,

among other cases, *First M. E. Church v. Sweny,* 85 Iowa 627, 52 N. W. 546; *Golden v. Meier,* 129 Wis. 14, 107 N. W. 27; 27 Am. & Eng. Ency. of Law (2d ed.) 285; *U. S. Grant University v. Bentley,* 117 Wis. 260, 94 N. W. 42; *Leland Norwegian L. Cong. v. Larson,* 121 Iowa, 151, 96 N. W. 706; *Wiswell v. Bresnahan,* 84 Me. 397, 24 Atl. 885; *M. E. Church v. Sherman,* 36 Wis. 404; *La Fayette Co. M. Corp. v. Magoon,* 73 Wis. 627, 24 N. W. 17; *Powers v. Rude,* 14 Okl. 381, 79 Pac. 89.

P. J. Winter, for the respondent, cited, besides other authorities, *Vogt v. Schiencbeck,* 122 Wis. 491, 100 N. W. 820; *Milwaukee C. Asso. v. King, F. & M. Co.* 112 Wis. 647, 88 N. W. 598; *Coman v. Wunderlich,* 122 Wis. 138, 99 N. W. 612; *Superior C. L. Co. v. Bickford,* 93 Wis. 220, 67 N. W. 45; *Gibbons v. Grinsel,* 79 Wis. 365, 371, 48 N. W. 255; *Hodges v. Nalty,* 104 Wis. 464, 80 N. W. 726; *S. C.* 113 Wis. 567, 89 N. W. 535; *Lathrop v. Knapp,* 37 Wis. 307.

TIMLIN, J. This action was brought upon a subscription agreement signed by the appellant and others underwriting the following:

"We, the undersigned members of the *Evangelish Lutherish St. Martins Gemeinde* in the town of Belle Plaine Shawano county, Wisconsin, pledge ourselves to pay the amount subscribed back of our names in such rates as are stated in this list for the building of the new church in the year 1907."

The appellant subscribed $200, $100 thereof payable in January, 1907. At the close of the testimony the court directed a verdict in favor of the respondent and against the appellant for $200 with interest. This subscription was made in November or December, 1906. The building of the church commenced in June, 1907. Prior to that time, and soon after the subscription was made, building material was purchased by the respondent.

It is shown by the evidence of both respondent and appellant that appellant signed this subscription list at the instance of the Reverend Karpinski, the pastor of the church, and one Meisner, and that there was a conversation immediately preceding appellant's signing, substantially to the effect that appellant would sign and make his subscription $200, provided he should not be called upon for team work and upon condition that the corporation should accept this subscription in full of his share of the expense of building the church. The two persons soliciting the subscription agreed that the subscription with this condition attached should be brought before the congregation for acceptance. There is considerable confusion in the testimony. The record of the meeting of the respondent corporation contained the following:

"Meeting of the congregation on May 5, 1907, *August Pruess* declared that he would be a member of this congregation no longer. It was decided upon that the pastor and two deacons should go to *August Pruess* and talk over this declaration or this matter with him."

Meisner at a meeting of the congregation, the date of which is not given, informed the congregation of the condition upon which this subscription was obtained and the necessity for accepting the subscription. The record of a meeting of the congregation on May 19, 1907, contained the following:

"Resolved that *August Pruess* cannot be released from the membership of the congregation before he pays his debts which he has with the congregation."

A witness on the part of the respondent testified that the subscription of *Pruess* was accepted by the congregation, but he did not know when this meeting was held, but it must have been in May, 1907. The pastor testified that the subscription was accepted by the congregation in the fore part of the summer of 1907.

The appellant testified in his own behalf, not very clearly,

it is true, but apparently relative to the meeting of M
He gave the following testimony:

"There was no meeting before May 5th. . . . I we
mad, and Koehler came after me, and I told him after
would not pay them a —— —— cent. Thereupon they
that meeting of May 5th for that purpose to accept it.
Meisner made a motion that they should accept it.
simply refused to vote on it, no action made wh
Thereupon I made a motion to ask them to release m
the church; that they would not vote on. Then I aske
to withdraw that subscription, give me a chance to sig
them so I could stand to pay afterward. They simply
that down. They did not want it. Thereupon I le
ceased to be a member. . . . I told them I would no
anything more to do with that church and would not
cent any more."

After this he was waited upon by the pastor and a
member of the congregation. They said to him the con
tion had done wrong in that they would not accept i
that they were going to accept it after that provided h
back to the church, and he told them he did not want t
back.

In the face of this positive testimony on the part
appellant and the uncertain testimony on the part of
spondent as to the time of acceptance of the subscript
is difficult to see on what grounds the circuit court dire
verdict for the respondent. The subscription was a
offer until accepted by the respondent. *M. E. Chu
Sherman,* 36 Wis. 404; *U. S. Grant University v. B*
117 Wis. 260, 94 N. W. 42; 27 Am. & Eng. Ency. o
(2d ed.) 280, 285.

In the case at bar this legal quality of a subscriptio
accentuated by the designation to the person solicitin
subscription by the appellant of the body which shou
cept his subscription and the concessions that body
make by such acceptance. It is true that acceptance of
scription may be made by expending money and erec

building in accordance with the offer. *Superior C. L. Co. v. Bickford,* 93 Wis. 220, 67 N. W. 45; *Eycleshimer v. Van Antwerp,* 13 Wis. 546. But in the instant case another kind of acceptance was expressly stipulated for, and, besides, there is no proof that the congregation accepted this prior to its attempted withdrawal by erecting a building or disbursing money relying on such subscription.

We forbear to comment further on the evidence. Another trial may disclose a different state of facts or result in clearer and more definite statements from the same witnesses, or show that the attempted revocation by the appellant was after the subscription was accepted by the congregation of the respondent, upon the conditions stipulated. We regard the complaint as sufficient, but are constrained to reverse the judgment appealed from because the court below erred in directing a verdict for the respondent. As to the appellant so contracting, if a contract was really closed, notwithstanding informalities in the articles of incorporation the respondent was at least a corporation *de facto.*

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

FENTON and others, Appellants, vs. RYAN and others, Respondents.

September 18—October 5, 1909.

Villages: Boundaries and area: Legislative discretion: Questions for courts: Constitutional restrictions: Water areas.

1. **The legislature, having the power to create villages, necessarily has a large discretion in the matter of determining what their boundaries shall be; and the courts will interfere with legislative action in that matter only when the discretion has been abused and there has been a violation of sec. 3, art. XI, Const.**

(requiring the legislature to provide for the organiz
incorporated villages), or of sec. 23, art. IV (requiring u
ity in town and county government).

2. Restrictions upon the size and with respect to density of
tion of territory which may be included in an incorpor
lage must be implied from the name of the corporation
purpose for which it is incorporated.
3. It may well be that it is competent for the legislature to
in sec. 854, Stats. (1898), that the area of a village t
corporated shall not be less than one half a square mile
ground that territory to that extent is reasonably n
to carry out the purposes for which villages are incor
4. The inclusion in a new village of territory, in excess of
a square mile, consisting of sparsely settled rural or
tural lands not having the distinctive characteristics
lage or any natural connection therewith, and not rea
appurtenant and necessary for the future growth of the
would be an invasion of the uniformity in town and cou
ernment required by sec. 23, art. IV, Const.
5. Whether, in a given case, the territory in excess of one
square mile which it is proposed to include in a new vi
such that it may properly be included therein, is a ques
the courts. A *dictum* to the contrary in *In re North Mil*
93 Wis. 616, *held obiter*.
6. A holding by the circuit court in this case that a water
seventy-five acres embraced within the boundaries of
posed village should be included as part of the one-half
mile provided for by sec. 854, Stats. (1898), was not err
nor was it tantamount to a holding that no village c
incorporated which bordered on a large body of wate
the petitioners need not include water areas in their p
boundaries, nor is there any statutory limitation of the
the village other than that it shall not include the enti
or towns.

APPEAL from an order of the circuit court for Outa
county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The appeal is from an order denying the applicat
the petitioners for an order incorporating the vill
Kimberly.

For the appellants there were briefs by *C. G. Cann*
torney, and a separate brief by *Hooper & Hooper*, of c
and oral argument by *Mr. Cannon* and *Mr. Moses Hoo*

For the respondents the cause was submitted on the brief of *Albert H. Krugmeier.*

BARNES, J. The court found that of the 576 acres embraced within the boundaries of the proposed village about 465 acres were rural or agricultural lands sparsely settled, not having the distinctive characteristics of a village, and not reasonably appurtenant to the remaining territory, and not necessary to be included within the limits of the proposed village for any legitimate purpose. Of the remaining 113 acres the court found that seventy-five acres were covered with water, and that the settled portion of the proposed village contained but thirty-eight and one-half acres, and that one half a section of land, including the submerged acreage, was ample territory for the proposed village, in view of its location, surroundings, and prospect of future growth. Upon the findings so made the court denied the application of the petitioners.

But one substantial objection is urged in support of the claim that the order appealed from is erroneous. It is argued that it is no proper function of a court to decide whether the proposed boundaries include an excessive amount of land, so long as the proposed area does not conflict with any statutory requirement. It is urged that the matter of fixing the limits of the village is a legislative or political question and not a judicial one, so long as such limits include one half a square mile in area and do not include the entire town. The cases of *In re North Milwaukee,* 93 Wis. 616, 67 N. W. 1033, and *Nash v. Fries,* 129 Wis. 120, 108 N. W. 210, are cited as sustaining the contention so made. It is held in the *North Milwaukee Case* that courts cannot decide questions of legislative policy by determining whether or not a village should be incorporated; that the legislature may say what prerequisites must exist and what steps must be taken before incorporation can be effected, and may authorize the courts to determine

whether such facts exist, but that no discretion can be vested in the courts to grant or refuse a certificate of incorporation. It was said by way of illustration that a court might determine such questions as whether the survey was correct, whether the population was as large as the statute required in proportion to the area, and whether the statutory requirements have been complied with on all questions of fact which the court may determine, but that the court might not determine whether the lands embraced in the petition should justly be included in the village, or whether the interests of the inhabitants would be promoted by the incorporation, or whether the boundaries of the village could be enlarged or diminished as justice might seem to require; such questions being legislative or political and not judicial. In *Nash v. Fries, supra,* it was held that if ch. 21, Laws of 1905, should be construed as vesting any discretion in the court to say whether a new town should be organized or not, the law could not be upheld under the rule of the *North Milwaukee Case.*

If, as contended by counsel for appellant, the court, in deciding that the boundaries of the proposed village included territory which should have been excluded, was passing upon a question that was legislative and not judicial, it follows as a matter of course that the order appealed from is erroneous under the decisions referred to. That the question is one for judicial determination is decided in *State ex rel. Holland v. Lammers,* 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. In deciding that case the court construed the law providing for the incorporation of villages in connection with sec. 3, art. XI, of our constitution, which declares that "It shall be the duty of the legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages," and also in connection with sec. 23, art. IV, of the constitution, which provides that "The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." The court there

defined what a village was understood to mean at the time of the adoption of the constitution, and held: (1) That if the law authorizing the incorporation of villages, as properly construed, permits rural territory possessing none of the attributes of villages to change from town to village government at will, it cannot be sustained. (2) That the law providing for the incorporation of villages fixes no limitation as to the maximum size of the territory that may be incorporated, except that it must be part of a town or towns, and prescribes no restriction as to density of population, except that it shall contain a resident population of not less than a stated number. (3) That a village means an assembly of houses less than a city, but nevertheless urban or semi-urban in its character, and having a density of population greater than can usually be found in rural districts, and that this was the understood meaning of what constituted a village at the time the constitution was adopted. (4) That if the law providing for the incorporation of villages contains no restriction upon the size or density of population of the territory sought to be incorporated, a restriction must be implied from the name of the corporation and the purpose for which it is incorporated. (5) That only territory urban in character, with such adjacent lands as are naturally connected with and are reasonably appurtenant and necessary for future growth in view of the surroundings and circumstances of the location and prospects of future prosperity, may be incorporated in the village. (6) That the territory seeking admission as a village must be harmonious with the idea of what a village actually is. It may not include large areas of rural or agricultural lands sparsely settled or widely distributed. It may only include lands having the distinct characteristics of a village, and such additions as have a natural connection with and seem reasonably appurtenant to and necessary for future growth. (7) That it is a question of fact, to be determined in each case as the question arises, whether the provisions of the constitu-

tion referred to may be violated by including territory within the limits of the village which should not be included therein. Such inquiry is judicial, not legislative, at least in the absence of any legislative declaration on the subject. (8) That the right to incorporate a village under sec. 854 is limited to such territory as possesses the characteristics mentioned. It must be a village in fact, with a reasonably compact center or nucleus of population, and not a mere agricultural community. If territory beyond the thickly settled limits is included, such territory ought reasonably to possess some natural connection with and adaptability to village purposes and seem reasonably to be necessary for future growth and development. (9) That in the absence of some specific legislation the courts must meet and determine in each given case the fact as to whether these restrictions have been overstepped.

It will be observed that the only declaration the legislature has made which affects the case before us for consideration is that any part of any town or towns not less than one half a square mile in area and not included in any village and all lying in the same county, which shall contain a resident population of 300 persons therein, may become incorporated as a village by taking certain steps enumerated in the statute. The legislature, having the power to create villages, necessarily has a large discretion in the matter of determining what the boundaries of such villages shall be. It is only when the discretion has been abused and the provisions of the constitution referred to have been violated that the courts may interfere with legislative action. The legislature has acted to the extent of saying that the area of the village which it is proposed to create shall not be less than one half a square mile. Beyond this the legislature has not gone. It may well be that it is entirely competent for the legislature to say that territory to the extent named is reasonably necessary to carry out the objects and purposes for which villages are incor-

porated. When we get beyond the legislative declaration, however, it would seem to be clearly a question of fact for the court to determine in each instance, under the law as it stands, whether the territory in excess of one half a square mile which it is proposed to include possesses the attributes which should naturally belong to territory included within the confines of an incorporated village. If it is proposed to include rural or agricultural lands that are sparsely settled, and that have not the distinctive characteristics of a village, and have no natural connection therewith, and which do not seem to be reasonably appurtenant and necessary for the future growth of the village, then the uniformity of town and county government guaranteed by the constitution is invaded under the decision of this court in *State ex rel. Holland v. Lammers,* 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. There cannot be any doubt that such a question is judicial in its character. The courts are the ultimate tribunals to determine whether or not the constitution has been violated in a given case. It is not seriously contended in this case that the facts as found by the court are not supported by the testimony. This being true, we see no escape from the conclusion that it would be a violation of the provisions of the constitution referred to, to incorporate this village and include within its boundaries the amount of territory described in the petition for incorporation. The statement in the *North Milwaukee Case* that a court could not determine whether lands embraced in a petition for incorporation should justly be included in the proposed village was made in reference to a subject not directly before the court for determination and can hardly be considered a part of the decision of the court. Besides, the constitutional question raised and decided in *State ex rel. Holland v. Lammers* was not raised, passed upon, or considered in the *North Milwaukee Case.*

It is argued that the court was in error in holding that the water area embraced within the boundaries of the proposed

village should be included as part of the one-half square mile provided for by sec. 854, Stats. (1898), and that such a ruling was tantamount to holding that no village could be incorporated which bordered on a large body of water. We do not think the position is tenable. The incorporators of the proposed village were not obliged to include water areas within the village limits if they did not desire to do so. Furthermore, there is no limitation placed upon the area of a village by statute further than to prevent the entire town or towns out of which the village is carved from being included within its boundaries.

We think the objectors had a sufficient interest in the proceeding to entitle them to appear therein and resist the granting of the petition, and that the court was authorized by sec. 860 to refer the questions in issue to a referee for examination and a report thereon, and that the order of the circuit court should be affirmed.

By the Court.—Order affirmed.

STATE EX REL. DAVERN, Respondent, vs. ROSE, Mayor, etc., Appellant.

September 20—October 5, 1909.

Constitutional law: Executive officers: Discretion: Interference by courts: Municipal corporations: Powers of mayor: Suspension of officers: Presumption of good faith: Mandamus.

1. Courts have no right to interfere with the exercise of the discretion vested in executive officers, state or municipal.
2. No wrong, in the legal sense, results when one receives all that the law accords him; and when the only right of an individual or of the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right.

3. Where an absolute duty, involving nothing of judgment or discretion, has been imposed upon an administrative or executive officer, performance thereof may be enforced in a proper case by the courts, if no other adequate method is provided.

4. A city charter declaring that the mayor shall be "the chief executive officer and the head of the fire department and of the police in said city" and that he shall "take care that the laws of the state and the ordinances of the city are duly observed and enforced," confers upon the mayor all of the power of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment, and does not make him a mere administrative officer.

5. The executive power conferred upon the mayor by such a charter includes the power to appoint and remove subordinate executive officers at discretion, except as qualified by other charter provisions.

6. Where a statute (ch. 378, Laws of 1885) amending a city charter vested the power of appointment and removal of the chiefs of the fire and police departments in a board of commissioners, but provided that either of said officers should be subject to suspension from office for cause by the mayor at any time, and that the mayor should at once communicate to said board the charge or charges against an officer so suspended, for the decision of the board thereon, the suspension might be made for any cause which, in the honest judgment of the mayor, might reasonably render it advisable for the public good.

7. The power and the duty of the mayor as to suspension of officers under such a statute is discretionary in a very high degree. He may weigh all considerations in determining whether he should exercise the power; and his decision not to exercise it, even where there has been gross dereliction on the part of the subordinate officer, is not subject to review or direction by the courts, unless there has been an entire refusal to consider and exercise discretion.

8. The mayor in such a case need not declare the reasons for his decision or his action in deciding against suspension, it being enough for him to declare that he deems the public welfare promoted by action or inaction, and even that declaration need only be by the act.

9. The courts in such a case must indulge in every *prima facie* presumption in favor of the good faith of the executive officer in his discharge of his duties, and only when it is established by the clearest possible evidence that he has wholly refused to exert his jurisdiction or to exercise any discretion whatever can the courts properly interfere by *mandamus*.

10. Where, upon charges being filed against a subordinate officer, the mayor entered into an investigation, taking various means to inform himself of the facts and of the situation, and declared his conclusion that the charges did not warrant suspension, there was an exercise of the discretion vested in him, and *mandamus* will not lie.

Appeal from an order of the circuit court for Milwaukee county: W. J. Turner, Circuit Judge. *Reversed.*

Mandamus. Relator asserts himself to be a citizen and taxpayer of the city of Milwaukee and that he petitions on behalf of himself and all others similarly situated; asserts various acts of misconduct on the part of the chief engineer of the fire department of said city, and that in September, 1908, he filed with the respondent, then and now mayor of the city of Milwaukee, certain charges of such misconduct; that thereupon said respondent called to his office a large number of the members of the fire department and took their *ex parte* oral statements, and thereupon refused to suspend said chief or to send such charges to the board of fire and police commissioners for investigation, on the ground, as stated by respondent, that said charges were too flimsy to receive serious consideration. The charges consist principally in that some two or three years before said chief temporarily misappropriated certain funds under his official control; that he committed perjury, for which he was indicted, tried, and acquitted in 1907; that at that time he was also guilty of subornation of perjury; that at some times, not named, the labor of certain city employees, and also certain city property, was under said chief's command expended for his private benefit; that he appointed a man upon the fire force because of personal pecuniary obligation to him instead of fitness; that immediately after filing such charges against him he discharged several of the members of the fire department; and other things not deemed material for statement.

The respondent moved to quash the alternative writ issued upon said petition (1) for insufficiency of the matter therein

stated to warrant a writ of *mandamus;* and (2) for defect of parties respondent by reason of the nonjoinder of the chief. The motion to quash was denied, from which action this appeal is brought by respondent.

For the appellant there was a brief by *John T. Kelly,* city attorney, and *Walter H. Bender,* assistant city attorney, of counsel, and oral argument by *Mr. Bender.*

For the respondent there was a brief by *Ryan, Ogden & Bottum,* attorneys, and *Hugh Ryan,* of counsel, and oral argument by *Mr. Ryan.* They contended, *inter alia,* that *mandamus* will lie to compel the mayor to suspend the chief of the fire department and send the charges against him to the board of police and fire commissioners for investigation. *State ex rel. Buchanan v. Kellogg,* 95 Wis. 672; *State ex rel. Starkweather v. Superior,* 90 Wis. 612; *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 574; *State ex rel. McGovern v. Williams,* 136 Wis. 1; *People ex rel. Empire City T. Club v. State Racing Comm'n,* 190 N. Y. 31, 82 N. E. 723; Merrill, Mandamus, §§ 37–41; *State ex rel. Castor v. Saline Co.* 18 Neb. 422, 25 N. W. 587; *Stockton & V. R. Co. v. Stockton,* 51 Cal. 328, 338; *Raisch v. Board of Ed.* 81 Cal. 542, 546; *Wood v. Strother,* 76 Cal. 545, 546, 548; *Brokaw v. Comm'rs,* 130 Ill. 482, 490, 22 N. E. 596; *Glencoe v. People ex rel. Owen,* 78 Ill. 382, 388, 390; *State ex rel. Brickman v. Wilson,* 123 Ala. 259, 45 L. R. A. 772; *State ex rel. Adamson v. Lafayette County Court,* 41 Mo. 221, 226; *Detroit v. Hosmer,* 79 Mich. 384, 386, 44 N. W. 622; *Ex parte Bradley,* 7 Wall. 364, 377; *Virginia v. Rives,* 100 U. S. 313, 323.

Dodge, J. With a debated question of defect of parties we shall not concern ourselves, since the view we have taken upon the general merits of this case renders it immaterial to the result.

The general plan of the government of the state, either generally or in such sections as its municipal corporations, is

framed upon the theory of intrusting to the legislative and executive branches, and administrative officers appointed within them, the formulation of policy and the execution thereof by officials, constitutional or legislative, in whom is vested the discretion as to what will be most promotive of the welfare of the community. In general that policy is decided by the legislature, in detail it must in many respects be left to the individual officials acting upon their knowledge of specific situations and their judgment as to what the public good requires in those specific instances. Those officers are selected either by the people directly, or by some other method considered likely to procure the persons best qualified in judgment, character, and ability to perform their respective duties. They take their places as public officers under the sanction of an oath of office and under the burden of a trust as binding and transcendent as do the judges of the courts. Their selection either by the people themselves directly or by their authorized representatives carries with it declaration of the fitness of each officer for his place, conclusive until the appointing authority can have an opportunity to speak again, or until those tribunals vested with authority to remove are invoked. With the exercise of the judgment and discretion committed to such officials the courts have no right to interfere, and this for a very good reason. The occupants of judicial places are not selected to manage the political affairs of the state. The qualifications for their places are vastly different and not such as to imply abilities to that end. Again, their opportunities for acquainting themselves with the needs and wishes of the people of the state or any locality, with all the complex elements involved in a given exigency, are in nowise comparable to those of the legislative or administrative officers. So that, other things being equal, the probabilities of a correct estimate of the needs of the public are far less in case of the judges than they are in case of the holders of the political offices. Of

course, all officials, being human, are liable to err, and the people must suffer the results of errors of judgment into which their responsible officials, judicial as well as others, may fall; but at least the theory of our government is that the peril of error of judgment or intention on the questions committed to them is less in the legislative and executive officials, close to the people and close to the facts of the exigencies in which they act, than it would be at the hands of the judiciary, selected for its supposed ability to apply abstract rules of law to concrete instances.

Thus much has been said because of a growing tendency, of which we think the present proceeding is illustrative, to suppose that any individual who differs with a public official as to the policy which the latter should pursue may demand that the judgment of some court as to his conduct shall be substituted for his own, and control his official acts. Nothing could be further from the theory of our government nor less likely to be promotive of public welfare. *People ex rel. Sutherland v. Governor,* 29 Mich. 320. Courts sit to remedy wrongs, and it is often urged that no wrong should by courts be allowed to go without a remedy; but no wrong in the legal sense results when one receives all that the law accords him. So when the only right of an individual or the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right, however his judgment may differ from that of others, even of the courts. *State ex rel. Cook v. Houser,* 122 Wis. 534, 570, 100 N. W. 964; *Rowell v. Smith,* 123 Wis. 510, 528, 102 N. W. 7.

Of course it is true that the legislature may, and very frequently does, impose upon executive and administrative officers absolute duty involving nothing of judgment or discretion except such as is first exercised by the legislature itself, which discretion, being there exercised and pronounced in the law, leaves no choice to the official. Such ministerial

duty may be enforced in a proper case by the courts if there is no other adequate method provided. It therefore becomes essential in every case of official action to consider whether the legislature has so passed upon all questions of policy and discretion and imposed by law a mere ministerial duty in obedience to their decision, or has reposed in the administrative or executive officer discretion as to when or how he ought to act.

In organizing the government of the city of Milwaukee the legislature followed the general lines of the governments of the United States and of the several states in creating legislative and executive departments and officers, mainly independent of each other. The charter provided for a mayor having, within the limited territory, the substantial characteristics of a chief executive in analogy to the President of the United States and the governors of the several states. The charter declared that the mayor should be "the chief executive officer and the head of the fire department and of police in said city," and that he should "take care that the laws of the state and the ordinances of the city are duly observed and enforced." These expressions signify the conferring of all the powers of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment. They also evince the reliance and confidence in the motives which should actuate the decisions finally arrived at by such an officer which accompany the delegation of broad discretion and responsibility to the other principal officers of government; imposing as an assurance and sanction for the faithful performance of such duties the same official oath as in the case of a governor of a state or the judges of the highest courts. The mayor, therefore, generally speaking, is in no sense a mere ministerial officer to perform only acts as to which the legislature has exercised all discretion and judgment and made him a mere implement of expression. While, as already said, mere ministerial duties may incidentally be

conferred upon him, the general words of the charter go much further. They indicate reliance in his discretion rather than mere ministerialism.

From early times the grant of executive power, the general power to execute the laws, has been construed as broadly effective of itself, and especially so in the matter of appointment and removal of subordinate officers. On this subject occurred the most famous historical instance of constitutional construction by a legislative body. In the first Congress of the United States, upon a bill to create the Secretary of Foreign Affairs, to be appointed by the President with the consent and approval of the Senate and "to be removed from office by the President of the United States," ensued in the House of Representatives one of the most remarkable debates in the history of the federal government, on the question whether the last-quoted words should be eliminated because implying assertion of power in the Congress to grant or withhold the right of removal; it being contended, on the one hand, that the power under the constitution might rest in any of several places, and, on the other hand, under the leadership of James Madison, that the "executive power" conferred by the constitution on the President had already vested in him the power of removal of executive officers, and that the Congress could not take it away and should not appear to claim such right. Those debates are contained in 1 Annals of Congress, extending from page 455 to page 585, and resulted in the overwhelming adoption of Mr. Madison's contention against the proposition that the power of removal inhered in or resulted from the power of appointment or rested with the legislature to grant or withhold, but that it was included in the "executive power," and hence was vested in the President. That construction of the constitution has received multitudinous approval since, and been recognized by all thoughtful and careful writers, jurists, and attorneys-general of the United States as settled.

2 Marshall, Life of Washington, 162; 1 Kent, Comm. 310; Bancroft, History of the Constitution; *Ex parte Hennen*, 13 Pet. 225; 4 Op. Att'y Gen. (Legare) 1; Id. (Clifford) 603, 609; 5 Op. Att'y Gen. (Crittenden) 288, 290. This subject was exhaustively discussed and a very complete collection of the expressions of leading writers thereon embodied in the brief for the government in *Parsons v. U. S.* 167 U. S. 324, 17 Sup. Ct. 880. Mr. Madison's views, thus adopted, are expressed more particularly on pages 462, 463, 464, and 499 of 1 Annals of Congress. Thus, before adoption of our constitution and before the draft of the Milwaukee charter, it had become established that executive power as conferred by such instruments included the power to appoint and remove subordinate executive officers at discretion, except as qualified by other expressions.

Hence, seemingly, it would be plain that in the absence of any other charter provisions the mayor, merely by his creation as the chief executive, and by the imposition of the duty to see that the laws and ordinances were enforced, would have the power of appointment and removal. That power, however, was qualified in some degree through all stages of the charter of Milwaukee up to the adoption of a fire and police commission by ch. 378, Laws of 1885, whereby the appointment and removal of the chiefs of the fire and police departments was vested in that board and taken away from the mayor. Sec. 6 of that act provides that in case of a vacancy in either office it shall be the duty of said board to appoint proper persons to fill such offices "during good behavior, subject to suspension and removal as hereinafter provided;" and sec. 12 conferred on the board the power to remove either such officer when of the unanimous opinion that the good of the service would be subserved thereby. These provisions, emanating from the legislature, were of course limitations upon the executive power of the mayor, but accompanying them was sec. 11 of the same act, which provided that the

chief of police and the chief of the fire department and other specified officers shall be subject to suspension from office for cause by the mayor at any time. Any officer so suspended shall thereupon cease to exercise the functions of his office until he shall be reinstated. In case of such suspension the mayor shall at once communicate to said board the charge or charges against the officer suspended, and the board shall at once consider and examine the same, giving the suspended officer opportunity to meet the charges and to be heard in his own defense. If the charges are not sustained by the board the officer shall be immediately reinstated. If they are sustained the board shall determine whether the good of the service requires removal from office or suspension, and their decision shall control the action of the mayor.

It is clear that thus was formulated an entirely new scheme or plan with reference to certain subordinate executive officers, whereby the whole subject of their appointment and removal was taken out of the hands of the chief executive of the city and vested in a board; but it is equally apparent that the legislature, appreciating the inherent incapacity of such boards for prompt and effective executive action in emergencies, intended to preserve in the mayor the power of suspension in a proper case. That power was lodged in the mayor as essential to his duty to guard the general welfare and to see that the laws and ordinances should be enforced. The cause mentioned in sec. 11 for which the suspension might be made, of course means any cause which in the honest judgment of the mayor as a trusted and responsible chief executive might reasonably render such suspension advisable for the public good. The discretion so conferred empowered him to weigh all considerations in deciding whether sufficient cause existed for such suspension. Those causes and considerations are innumerable. A perfectly good cause for removal may be no sufficient cause for summary suspension, and, *vice versa,* a good cause for temporary sus-

pension may exist which does not warrant complete removal. In the case of the fire chief his abilities as a fighter of fire to preserve property and the safety of the community are considerations of great importance which may well deter the mayor in his honest judgment from even temporarily displacing him and leaving the city without his services, although he may lack many other attributes of an ideal public officer, and thus make choice of a successor advisable. The condition of things as to the presence upon the force of a subordinate able to supply those emergency qualities which the chief may have might well justify the mayor in deciding not to suspend one whom he may believe ought not permanently to continue as the chief of that fire department because of other defects of character during consideration by the board of the sufficiency of those defects as cause of removal. For multitudinous reasons like these, it is not the absolute duty of the mayor, even if informed of great or even gross dereliction in certain directions, to momentarily deprive the city of the protection resulting from other abilities of such an officer as the fire chief or the chief of police.

The contention of respondent to the effect that whenever charges are laid by a "citizen and taxpayer" a ministerial duty is imposed upon the mayor to forthwith suspend, at once suggests illustrations which are convincing of the impossibility of such legislative intention. Were the chief of police engaged in a campaign against gambling houses or houses of ill-fame, he would naturally draw upon himself the antagonism of those who profit from such establishments, and if, at the critical moment of such proceeding, a fearless and effective chief of police must lay down the fight because the proprietor of such a building, a "citizen and taxpayer," laid some charge of general impropriety or even dishonesty against him, the possibility of the enforcement of the laws and ordinances for the time being at least might well disappear. The mayor must be authorized in such a case to look

not alone to the charges, but as well to the necessities of the community. The possibility of a substitute for the assailed officer competent to meet the exigencies of the moment and an infinity of other considerations as to whether it is best that he be summarily suspended and the office left vacant until the commission can, in the slow course of investigation and procedure that must characterize such bodies, fill the place with another appointee, present themselves in such a contingency. We are persuaded that the power, and of course the duty, of suspension preserved in the mayor by sec. 11 is discretionary in a very high degree, and therefore, under the uniform holding of this court, that the mayor's decision not to exercise it is not subject to review or direction by the courts, unless indeed there may be found an entire refusal to consider and exercise discretion. *State ex rel. Gill v. Common Council,* 9 Wis. 254; *State ex rel. Gericke v. Mayor, etc.* 99 Wis. 322, 326, 74 N. W. 783; *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, 574, 88 N. W. 587; *State ex rel. People's L. & Mfg. Co. v. Holt,* 132 Wis. 131, 111 N. W. 1106; *State ex rel. Wis. Met. Tel. Co. v. Milwaukee,* 132 Wis. 615, 618, 113 N. W. 40; *State ex rel. Rudolph v. Hutchinson,* 134 Wis. 283, 114 N. W. 453; *State ex rel. Vanderwall v. Mayor, etc.* 134 Wis. 437, 114 N. W. 802; *State ex rel. Wagner v. Dahl, ante,* p. 301, 122 N. W. 748; High, Extr. Leg. Rem. § 42.

In this case we can find nothing of such refusal. There is no duty resting upon an executive officer vested with such ample discretion as this to declare the reasons for his decision or his action in deciding against suspension. It is enough for him to declare that he deems the public welfare promoted by action or inaction, which declaration indeed need only be by the act. John Adams, who, as Vice-President, had cast the deciding vote in favor of Madison's construction of executive power, referred to in an earlier part of this opinion, gave his own illustration, when President, of the

extent of accountability of the chief executive under such a power in his communication of May 12, 1800, to the then secretary of state, which reads:

"Divers causes and considerations essential to the administration of the government in my judgment requiring a change in the department of state, you are hereby discharged from any further service as secretary of state. John Adams, President of the United States."

In the presence of such a solemn declaration courts must indulge in every *prima facie* presumption in favor of the good faith of the executive officer in his discharge of his duties as such, and only when it can be established by the clearest possible evidence that such officer has wholly refused to exert his jurisdiction or to exercise any discretion whatever can the courts properly interfere by *mandamus*. *Spalding v. Vilas,* 161 U. S. 483, 16 Sup. Ct. 631; *People ex rel. Peabody v. Att'y Gen.* 22 Barb. 114, 118; *Ely v. Cram,* 17 Wis. 537; *Connor v. Marshfield,* 128 Wis. 280, 288, 107 N. W. 639.

In the present case it appears by the relation itself that upon receipt of relator's so-called charges the mayor did enter into an investigation, took various means to inform himself of facts and of the situation, and declared his conclusion that the charges did not warrant the suspension of the officer, resulting as it must to the latter's great detriment and to the deprivation of the city and the public of his services. It is apparent, therefore, on the face of the papers that the discretion was exercised, and that the conditions upon which it might be the duty of the mayor to suspend the fire chief did not exist. Hence, of course, the motion to quash should have been granted.

By the Court.—Order reversed, and cause remanded with directions to quash the alternative writ of *mandamus* and to dismiss the proceeding.

RUTH, Plaintiff in error, vs. THE STATE, Defendant in error.

September 20—October 5, 1909.

Criminal law: Information: Election between counts: Banks and banking: False entries and false reports: Evidence: Expert accountants: Conclusions from books: Immaterial errors: Verdict: Presumptions: Instructions to jury.

1. The matter of requiring prosecuting officers in criminal cases to elect on what count of an information they will prosecute the cause is very much in the discretion of the trial court.
2. Three counts charging a bank cashier (1) with making false entries in the certificate register of the bank, (2) with making false entries in a ledger as to the amounts due from another bank, and (3) with making a false report to the commissioner of banking as to the amount due on time certificates and as to the amount due from other banks, all in violation of sec. 17, subch. II, ch. 234, Laws of 1903, were properly included in one information; and it was not error to refuse to compel the prosecuting attorney to elect between them.
3. In the trial of a case involving the examination of long book accounts it is proper for expert accountants to give in evidence, in summary form, the results of their examination of the books, time and opportunity being granted to the opposite party to use the books to test the correctness of such evidence and for the purpose of cross-examination.
4. In a prosecution for making a false report to the commissioner of banking, defendant was not prejudiced by testimony of experts that the books of another bank showed that he had falsified book entries and his report of the amount due from other banks to his bank, although there was no evidence of the contents of the books of the other bank or of their correctness,—it appearing otherwise conclusively from the report that defendant knowingly made a false report based on incorrect statements in the books of his bank, so that the testimony of the experts was simply corroborative of defendant's admitted knowledge of the falsity of the book entries and of his report to the commissioner of banking based thereon.
5. Under a count in an information charging that defendant wilfully made a false report to the commissioner of banking respecting (1) the amount due from other banks and (2) the amount of outstanding time certificates of deposits, a verdict of guilty may be sustained upon proof that the report was false

as to either one of the two matters specified, if it appears that the jury agreed as to that one.

6. In such a case a verdict of not guilty on another count charging the making of false entries in the bank's register of certificates (with which entries the report as to such certificates agreed) is *held* to show that the verdict of guilty as to the report was based on an agreement of the jury that such report was false in respect to the amount due from other banks.

7. It will be presumed that the verdict of the jury rests upon the facts established by the evidence.

8. An information charging the making of a false report to the commissioner of banking respecting two specific matters was read to the jury, and they were instructed that it was for them to determine under all of the evidence "whether or not there are any false statements or false entries in reference to the resources and liabilities of the bank . . . contained in such report, and whether or not such report contains any false statements or false entries with reference to any of the books of such bank." *Held*, that it must be presumed that the jury applied this general language to the specific matters charged in the information read to them, and that the instruction was not prejudicial to the defendant.

Appeal from a judgment of the circuit court for Trempealeau county: J. J. Fruit, Circuit Judge. *Affirmed.*

The defendant in this case was the cashier of the Bank of Arcadia. He had been cashier for twenty-five years and was the executive head of the bank. In response to the request of the state commissioner of banking the defendant on December 3, 1907, made a report of the condition of the bank under his charge. The report was unsatisfactory to the commissioner, and upon examination of the bank he determined that the cashier was guilty of irregularities in the administration of the bank's affairs and had attempted to conceal them by false entries and omissions in the bank's books and by false statements in his report. Defendant was arrested upon the complaint of the commissioner charging him with the making of false entries in the books of the bank and in the report to the commissioner. He was informed against by the district attorney, and was charged (1) with making false entries in

the certificate register of the Bank of Arcadia, of which he was cashier; (2) with making false entries in a ledger, falsely stating the amount due to the Bank of Arcadia from the Second National Bank of Winona, Minnesota; (3) with making false entries in the report of the bank of which he was cashier to the state commissioner of banking regarding the amount "Due from banks" and the amount due on "Time certificates of deposit." The defendant demurred to the information for the reason that the three counts were improperly joined. The court overruled the demurrer. The defendant moved the court that the state be required to elect upon which count it would proceed to try the defendant. This motion was denied, and the defendant was tried on the charges as preferred in the information.

The register of certificates of deposits, some certificates of deposit, some pages of the cash book, and other records of the Bank of Arcadia, and two statements of the relation of the Bank of Winona to the Bank of Arcadia, which had been prepared by the bank and which were identified by the cashier of the Bank of Winona, were introduced in evidence. An expert who had spent some twelve days examining the books of the Bank of Arcadia gave evidence that there had been a difference between the books of the two banks for several years, and pointed out the entries in the books of the Bank of Arcadia or the failure to make entries of transactions and the other means by which these differences had been concealed. The evidence of this witness and of others tended to show that the entries made regarding the amounts due from the Bank of Winona to the Bank of Arcadia were not correct, and that the amount given in the report of the defendant to the commissioner of banking as to the amount of money due from the bank on time certificates of deposits was about $2,000 less than was the fact. The practice of the bank and the authority of the cashier in the matter of the books of the bank was put in evidence to establish defendant's responsi-

bility for incorrect statements regarding the bank's affairs and for false entries in the books of the Bank of Arcadia. At the conclusion of the evidence the court took from the jury the consideration of the second count in the information, on the ground that the evidence would not sustain a conviction on this count.

In submitting the case to the jury the court, after reading to them the third count in the information, instructed them:

"It is for you to determine under all of the evidence in the case whether or not there are any false statements or false entries in reference to the resources and liabilities of the bank . . . contained in such report, and whether or not such report contains any false statements or false entries with reference to any of the books of such bank."

The jury returned a verdict finding the defendant not guilty on the first count, but guilty on the third count. The case is now before this court for review.

John F. Doherty and *Geo. W. Bunge,* for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *E. F. Hensel,* of counsel, and oral argument by *Mr. Titus* and *Mr. Hensel.*

Siebecker, J. The plaintiff in error alleges that the refusal of the court at the beginning of the trial to compel the district attorney to elect on which count of the information he would prosecute the case operated to his prejudice. The three counts of the information charged the defendant with making false entries in the books of the bank and with making a false report to the commissioner of banking. It is apparent that all of the offenses alleged in the three counts of the information pertained to alleged false entries in the bank books respecting transactions with other banks and with reference to outstanding time certificates. It is alleged that

these transactions were violations of the provisions of sec. 17, subch. II, ch. 234, Laws of 1903, which makes it an offense if "any banker, officer, director or employee of any bank . . . shall wilfully and knowingly subscribe to or make, or cause to be made, any false statement or false entry in the books of any bank, or mutual savings bank, . . . or shall knowingly make, state, or publish any false report or statement of such bank, or mutual savings bank." The different counts of the information all relate to false book entries and to the report to the commissioner of banking based thereon. The matter of requiring prosecuting officers in criminal cases to elect on what counts of an information they will prosecute the cause is deemed to be very much in the discretion of the trial court. It was no error to join the three counts in one information. The separate alleged offenses referred to false entries in the bank books and the report to the commissioner of banking, and pertained to acts of the defendant in making or causing a series of false book entries to be made for the purpose of deceiving others as to the true state of the bank's accounts and financial condition, and falsely reporting thereon to the commissioner of banking. These matters arose out of the transactions and acts of the defendant pertaining to his administration of the bank's business. Under such circumstances it was proper to charge the defendant with the different offenses arising out of these transactions in the same information and to proceed to trial on all of them. Such a proceeding in no way deprived the defendant of any rights, nor did it put him at a disadvantage in making his defense. This course of procedure is abundantly approved in the adjudications of this court. *State v. Gummer,* 22 Wis. 441; *Martin v. State,* 79 Wis. 165, 48 N. W. 119; *Colbert v. State,* 125 Wis. 423, 432, 104 N. W. 61. See, also, Bishop, New Crim. Proc. §§ 422–444.

The court discharged the defendant as to the second count and no further consideration need be given it.

It is urged by the accused that the court committed prejudicial error in admitting the evidence of the experts respecting the state of the account between the Arcadia and Winona banks and the condition of the accounts of the Arcadia bank. The claim is that these experts were permitted to testify that items of book entries were shown to be incorrect by means of summary statements and tables which they had taken and made from the book accounts of the books of both banks, without introducing in evidence all of these books and the entries on which such statements were based, and without producing any evidence tending to show that the book entries and accounts of the Winona bank were correct and true. The practice of permitting expert accountants to examine long book accounts and to give in summary form the results thereof for the information of the court and jury is approved as practical and proper in the trial of causes involving the examination of long book accounts. A proper administration, of course, requires that the opposing party shall be afforded the time and opportunity to test the correctness of the evidence, and for this purpose to have access to the books and the use of them for the purposes of cross-examination. In so far as this practice was adopted in the case, we find nothing in the record showing that the evidence of the experts on this subject was improper. The claim that the failure to offer in evidence all of the account books of the Arcadia bank which was covered by this evidence operated to defendant's prejudice is not shown, for it appears that all such books were brought into court, were identified, and were accessible to the defendant and his attorney.

It appears from the evidence of the experts that the Arcadia bank books disclose the fact that the defendant inserted in his report to the commissioner of banking an incorrect and false sum as the amount due from the Winona bank. It is contended that this evidence of the experts also included a statement that the books of the Winona bank show that the

defendant falsified book entries and his report of the amount due from other banks, that there is no evidence of the contents of such books or of their correctness, and that the jury may have found the defendant guilty upon this evidence. The inquiry arises whether such evidence could operate to the prejudice of the defendant. We conclude that the defendant could not have been prejudicially affected thereby, because it appears conclusively from the record, aside from the expert's evidence in the case, that he knowingly made the false report as charged in the third count of the indictment of which he was found guilty by the jury. It is established by the defendant's evidence that the bank's ledger accounts did not correctly state the amount due from the Winona bank on December 3, 1907, the date when the defendant reported the condition of his bank to the commissioner of banking. He testifies that he knew that these ledger accounts were incorrect, in that the sum due from the Winona bank, as there stated, exceeded the actual amount, and that the amount reported to the commissioner of banking as due from other banks was based on this incorrect statement. This state of the evidence shows that the statements of the experts were simply corroborative of defendant's admitted knowledge of the falsity of the book entries and of the report of December 3, 1907. The expert evidence so received could not under such circumstances operate to prejudice the defendant in any way, for he raised no issue as to these facts, and the inference of guilt from such undisputed facts was left to the determination of the jury.

It is furthermore contended that the verdict cannot stand because the element of the offense charged in the third count respecting the falsification of the report as to outstanding time certificates is not sustained by evidence, and because the jury in their verdict found defendant not guilty of wilfully falsifying the books and the report in this respect by their verdict on the first count in the information. The third count

charges the defendant with the offense of making a false report to the commissioner of banking and specifies that it was false in two respects, namely, in falsifying the items respecting (1) the amount due from other banks, and (2) the amount of the outstanding time certificates. The argument is that, since these two items are embraced in the charge, a verdict of guilty thereof cannot stand unless the proof shows that the report was falsely made as to both items. We do not find the claim well founded. True, the offense of falsifying the report is alleged to have been in the two particulars specified, but a finding that it was made wilfully false with intent to deceive in one of the specified ways would establish the offense of making a false report. It seems obvious that a falsification of the report as to one item constitutes a violation of the law under the alleged charge independently of the other violation specified in the information. The claim that it cannot be known whether the jury agreed to a verdict of guilty for falsely reporting the amount due from other banks is not to be indulged in view of their verdict that he was not guilty under the first count. This establishes affirmatively that their verdict of guilty on the third count must be based on other grounds and that it could only be that he made a false report of the amount due from other banks. Furthermore, it is presumed that the verdict of a jury rests upon the facts established by the evidence in the case. We are of the opinion that the verdict of guilty must be held to be an agreement of the jury that the defendant falsely and feloniously reported the amount due from other banks and it should stand.

The instructions of the court are assailed as erroneous for the reason that the court did not restrict the jury in agreeing upon their verdict upon the third count in the information to the offense embraced therein. The court read to the jury this charge in the information, and then stated to them:

"You have heard what it [the information] contains, and you have also had offered before you in evidence the report

itself, and it is for you to determine under all of the evidence in this case whether or not there are any false statements or false entries in reference to the resources and liabilities of the bank . . . contained in such report, and whether or not such report contains any false statements or false entries with reference to any of the books of such bank."

Though the court used the words "any false statements or false entries" in speaking of the book entries and the resources and liabilities, it must be presumed that the jury applied this language in view of what immediately preceded, namely, that the prosecution was for falsifying the report in the two respects alleged in the information just read to them. This correctly informed them of the items embraced by the court in this general reference to any false statements or entries embraced in defendant's report. The instruction was therefore sufficiently restrictive to guide the jury in their deliberations and was not prejudicial to the accused.

We find nothing in the record showing any error affecting the substantial rights of the defendant to his prejudice and calling for a reversal of the judgment.

By the Court.—Judgment affirmed.

MALUEG and another, Respondents, vs. HATTEN LUMBER COMPANY, Appellant.

September 18—October 26, 1909.

Contracts: Breach: Measure of damages: Sales: Partial delivery: Payment: Waiver of damages: Termination of contract: Subsequent delivery: Market price.

1. A person may, at law, breach his contract with another and be liable only to respond to that other for such legal damages as will remedy the loss to him.
2. The legal damages for breach of contract are such as may fairly and reasonably be considered to be the natural and proximate result of the breach and, in the light of the circumstances

known, actually or constructively, to both parties at the time of such making, as having been then in their mutual contemplation as the probable result of such breach.

3. The rights of parties as regards a breach of contract become fixed at the time the breach occurs.

4. If a breach of contract consists of failure to deliver, upon a sale agreement, personal property at a specified time, there being no special circumstances, known to both parties at the time of making the agreement, varying the general rule, the damage recoverable is the difference, at the time of the breach and at the agreed place of delivery, between the market value of the property and the contract price, with legal interest from the time of the breach.

5. In case of an action for damages for breach of contract, in the circumstances mentioned in No. 4, in the absence of evidence that the market value of the property at the time and place of delivery agreed upon, exceeded the contract price, no more than nominal damages are recoverable.

6. In case of partial delivery of property, in the circumstances mentioned in No. 4, and payment therefor after the breach without objection and with knowledge of the facts, the agreement providing for payment as fast as deliveries are made, such circumstances do not, of themselves, waive any claim for damages for such breach.

7. In case of the breach of contract in the circumstances stated in the foregoing, and a claim thereafter upon the side of the executory vendee that he is legally entitled upon the contract to the balance of the property, and insistence upon the other that he is under no such obligation, and delivery of the balance of the property pursuant to a mutual understanding for payment therefor at the market price at the time of delivery, in case of the vendee not being entitled as he claims, the vendor should be paid such market price.

[Syllabus by Marshall, J.]

Appeal from a judgment of the circuit court for Shawano county: John Goodland, Circuit Judge. *Affirmed.*

Action to recover on a contract for a claimed balance for sawlogs sold defendant by plaintiffs at a stipulated price.

Defendant answered putting in issue plaintiffs' claim as to the agreed price for the logs and as to there being a balance due. It pleaded as a defense that, for the purpose of supplying its mill with a stock of sawlogs for the manufacturing

season of 1906, it contracted in writing with plaintiffs to cut into sawlogs and deliver to it at a specified place, during the winter of 1905 and 1906, all the sawlog timber on certain specified land at a price per thousand feet named, final payment therefor to be made upon all the logs being scaled and full performance by plaintiffs; that in partial performance 276,230 feet of logs were duly delivered, scaled, and paid for during the winter of 1906; that notwithstanding defendant was ready and willing to accept and pay for the balance of the sawlogs agreed to be delivered, plaintiffs neglected to make delivery thereof during the time limited in the contract; that thereupon such time was extended to include the next logging season; and that plaintiffs have received full payment for all logs delivered.

Defendant, for a counterclaim, pleaded the aforesaid facts and that the amount of timber which plaintiffs failed to deliver during the logging season of 1906 and 1907 was 191,880 feet of short and 11,310 feet of long hemlock logs, to its damage in the sum of $406.38. The counterclaim was duly replied to. Upon the trial plaintiffs claimed that the written contract did not cover the operations of the season of 1906 and 1907; that during the season they delivered to defendant the sawlogs it claimed should have been delivered during the previous season, but made such delivery under an oral agreement increasing the price for the logs $2 per thousand feet. Such increase coincided with the amount claimed in the complaint.

There was proof that, at the close of the first logging season, defendant settled with plaintiffs for all logs delivered during such season, without objection because of the contract not having been fully performed, and that the price claimed by plaintiffs for logs delivered the second season was the going price thereof and the amount defendant verbally agreed to pay therefor.

There was evidence on the part of defendant that, before

the logging operations commenced the second season, it gave plaintiffs written notice that it claimed the contract covered the balance of the timber, but later promised that, if it should turn out otherwise, it would pay the going price.

At the close of the evidence the court, on motion, directed a verdict for plaintiffs upon their theory of the case; holding that by paying in full at the close of the first season without objection, notwithstanding the contract had been breached as claimed in the answer, such breach was waived and the contract extinguished; and that the agreement to pay the price for the logs delivered the second season, in case the contract as to such season was of no effect, entitled plaintiffs to recover. Judgment was entered accordingly.

R. N. Van Doren, for the appellant.

P. J. Winter, for the respondents.

MARSHALL, J. This case is ruled by a few familiar legal principles.

Keeping in mind the conceded fact that respondents breached the contract in question by neglecting to deliver to appellant all the saw timber standing upon the land manufactured into sawlogs, properly scaled, by the close of the logging season of 1906, the first principle to be mentioned is that a person, at law, may of right breach his contract with another and subject himself to the burden of such damages for the benefit of such other as may be necessary to remedy the breach. *Ward v. Am. H. F. Co.* 119 Wis. 12, 96 N. W. 388.

It follows that, after the breach in question, if respondents saw fit, as it seems they did, to stand upon their legal rights and not recognize the contract as binding them to deliver the balance of the timber left at the close of the winter of 1906, it was competent for them to do so, leaving appellant, as its only recourse to remedy the matter, enforcement of a cause of action for damages, if any there were.

The next legal principle applicable to the case, in the logical order of things, is this very familiar one: The damages recoverable for breach of contract are such as may fairly and reasonably be considered to be the natural and proximate result thereof and which, in the light of circumstances known, actually or constructively, to both parties at the time of making the contract, may reasonably be supposed to have been in their mutual contemplation as the probable result of such breach. *Hadley v. Baxendale,* 9 Exch. 341; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Gross v. Heckert,* 120 Wis. 314, 321, 97 N. W. 952; *Anderson v. Savoy,* 137 Wis. 44, 48, 118 N. W. 217.

In connection with the last foregoing rule is the one that, in case of a breach of contract, the rights of the parties are regarded as fixed at the time thereof, so, if such breach consists in failure to deliver upon a sale contract personal property to be paid for after delivery; there being, as in this case, no special circumstances rendering more than ordinary damages probably within the contemplation of the parties at the time of making the contract as likely to occur from such failure, the limit of legal damages is the difference, at the time of the breach, between the market value of the property at the time and place of delivery and the price the executory purchaser agreed to pay therefor with legal interest from the date of the breach. *Richardson v. Chynoweth,* 26 Wis. 656; *Hill v. Chipman,* 59 Wis. 211, 18 N. W. 160; *Muenchow v. Roberts,* 77 Wis. 520, 522, 46 N. W. 802; *Kelley, M. & Co. v. La Crosse C. Co.* 120 Wis. 84, 97 N. W. 674; *Anderson v. Savoy,* 137 Wis. 44, 48, 118 N. W. 217.

So if appellant suffered any recoverable loss by failure to deliver the timber as agreed upon, it consists of the difference between what the market value of the undelivered timber manufactured into sawlogs was at the time when and place where the same should have been delivered and the contract price thereof. What such logs were worth in the market the

succeeding winter, is entirely immaterial on this branch of the case.

In the light of the foregoing, since, as the fact is, there was no proof offered or received tending to show that the market value of such logs as respondents agreed to deliver at the time for the delivery, exceeded the contract price, there was an entire failure of proof to maintain appellant's counterclaim. So respondents were entitled to recover, as they did, the undisputed market value of the logs delivered in the winter of 1906 and 1907. Breach of contract without any legal damages obviously gives no right of recovery. *Main v. Procknow,* 131 Wis. 279, 111 N. W. 508.

It is claimed on the part of respondents that making final payment for all logs delivered, after the time fixed in the writing for performance, without making any objection because of the breach, notwithstanding it had full knowledge of the facts, constituted a waiver of any further rights under the contract either for the balance of the logs or damages. There having been no pretense at the time payment was made that the contract had been fully performed, the mere payment for the logs delivered, keeping silent as to any further claim under the contract, did not of itself waive anything. The transaction was strictly according to the terms of the writing. It contemplated payment for logs from time to time as they were delivered and scaled. One may always accept and pay at the contract rate for partial performance, as in this case, without waiving, by such circumstance alone, his right to redress for failure of full performance. *Charley v. Potthoff,* 118 Wis. 258, 95 N. W. 124. Such a case must not be confused with those where articles are delivered in performance of an executory contract of sale as and for the amount and kind agreed upon and are received and retained with knowledge, or reasonable means of knowledge, that they do not fully answer the calls of the agreement, and without

notifying the vendor within a reasonable time that the articles are not accepted as full performance.

Notwithstanding the contract was not terminated by payment for the logs delivered under the circumstances stated, it does not follow that appellant had any further rights under it. It had no right to damages for the breach unless it suffered damages and none were established; as appellant evidently appreciated and conceded at the close of the trial. It had no legal right to further deliveries of logs after the close of the winter of 1906. The evidence is substantially all one way, as the trial court held, that the market value of the logs delivered the second season was as claimed by respondents and that if they were entitled to recover on that basis the amount due them was as found in the directed verdict. The evidence is all one way, that respondents refused to recognize the contract which, by its terms, terminated at the close of the winter of 1906, as binding them to let appellant have the logs delivered the second season. The latter conceded upon the trial that it promised to pay the former the market price for logs the second season if the contract did not entitle it to them at the price named therein. The controversy between the parties at the commencement and during the early part of the second season, as the evidence conclusively shows and the court found, was not over the market price or the amount respondents should have for the logs in the absence of any writing governing the matter, but over whether respondents were bound to deliver the logs under the writing of 1906.

So the case really turns, as the trial court found, on whether the writing was effective as to the second season notwithstanding the breach aforesaid and respondents' insistence thereon. On that question the decision of the trial court was right though the grounds stated therefor are not altogether approved. Further performance of the contract on respondents' part was not waived by appellant by the

occurrences in the spring of 1907 before mentioned. It terminated by its own limitations, subject to appellant's right to damages, if any were suffered, because of there being but partial performance and subject to mutual recognition, in case of there being such, of its further efficacy. Therefore the judgment must be affirmed.

By the Court.—So ordered.

O'Connor, Respondent, vs. Queen Insurance Company of America, Appellant.

October 5—October 26, 1909.

Fire insurance: What constitutes "fire:" Cause of loss: Court and jury.

1. **A fire built in a furnace with unsuitable material, which became in a measure uncontrollable and developed excessive and extraordinary heat, so intense in the chimney as to char woodwork, wall paper, and furniture, and which caused volumes of smoke and soot to escape through the registers and injure personal property in the house, was a "hostile" fire although there was no ignition outside of the furnace; and the damage to the personal property was "direct loss or damage by fire" within the meaning of the Wisconsin standard fire insurance policy. Marshall, J., dissents.**
2. **The question whether damage to insured property was caused by fire is ordinarily one for the jury, but its determination by the court is not error where the facts are practically undisputed.**

Appeal from a judgment of the municipal court of Outagamie county: T. H. Ryan, Judge. *Affirmed.*

Action upon a fire insurance policy. The servant of plaintiff built a fire in the furnace with paper and cannel coal, not used or intended to be used for such purpose, which fire developed within a few moments to such a degree of fury as to fill the house with great volumes of smoke, soot, and excessive and intense heat, and damage the personal property

therein to the amount as found by the jury $562. The only question submitted to the jury was the amount of damages, and the court directed a verdict for the plaintiff for the amount of damages found by the jury. Judgment was entered for plaintiff accordingly, from which this appeal was taken.

For the appellant there was a brief by *D. G. Classon,* attorney, and *Bates, Harding, Edgerton & Bates,* of counsel, and oral argument by *Mr. Classon.*

Francis S. Bradford, for the respondent.

The following opinion was filed October 26, 1909:

KERWIN, J. The policy in this case, being the Wisconsin standard form, insured the plaintiff "against all direct loss and damage by fire;" and the controversy is as to whether the loss and damage was caused by anything insured against by the defendant company. The question arises whether the fire which caused the damage was a fire within the meaning of the policy. The plaintiff lived in a rented house heated by a furnace. His servant built a fire in the furnace of material not for use therein or intended so to be used, and of such a highly inflammable character as to cause intense heat and great volumes of smoke to escape through the registers leading into the rooms and greatly damage plaintiff's property. The heat was so intense as to char and injure furniture, and the great volumes of smoke and soot greatly injured the furnishings and personal property of the plaintiff. It does not appear from the evidence that there was any ignition outside of the furnace, although the fire was so intense as to overheat the chimney and flues and char furniture in the rooms. The evidence shows that the chimney was so hot it seemed as though it was on fire; that the fire was burning fiercely in the furnace; around the mop boards was burned and the mop boards blistered; the wall paper charred and burned and the chimney cracked from the excessive heat.

It is the contention of appellant that the damage occasioned by heat, smoke, and soot is not covered by the policy where the fire is confined within the furnace. This position involves the construction of the words of the policy, "direct loss or damage by fire," and leads to a consideration of what fires are within the contemplation of the policy.

No limitation is placed upon the word "fire" by the language of the policy itself, but it is said that "contracts of insurance are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and proper sense." No doubt this is the general rule, but it must also be remembered in applying the rule that this and other courts have construed contracts of insurance favorably to the insured. *Karow v. Continental Ins. Co.* 57 Wis. 56, 15 N. W. 27; *Brady v. North Western Ins. Co.* 11 Mich. 425; May, Ins. (3d ed.) § 402; *Peters v. Warren Ins. Co.* 14 Pet. 99.

Appellant insists that a fire confined within the limits of a furnace, although producing damage by smoke and heat, is not a fire within the meaning of the policy in question, and relies mainly upon the case of *Austin v. Drew,* 4 Camp. 360. In that case the plaintiff was the owner of a sugar factory several stories high with pans on the ground floor for boiling sugar and a stove for heating. A flue extended to the top of the building with registers on each floor connecting with the flue to introduce heat. Because of the negligence of a servant in not opening a register at the top of the flue, or chimney, used to shut in the heat during the night, the smoke, sparks, and heat from the stove were intercepted and, instead of escaping through the top of the flue, were forced into the rooms, in consequence of which the sugar was damaged. The flames were confined within the stove and flue and no actual ignition took place outside thereof, and it was held that the loss was not covered by the policy. The Lord Chief Justice

said that there was no more fire than always existed when the manufacture was going on, and which continued to burn without any excess. The case seems to turn upon the point that the fire was the usual and ordinary fire, never excessive, and always confined within its proper limits. We shall briefly refer to other cases cited by appellant on this point.

In *German Am. Ins. Co. v. Hyman,* 42 Colo. 156, 16 L. R. A. N. S. 77, the loss was caused by an explosion produced by lighting a match, where the policy contained a provision that the insurers should not be liable for loss by explosion unless fire ensues, and in that event for the damage by fire only. *Samuels v. Continental Ins. Co.* 2 Pa. Dist. Rep. 397, was a claim for damages caused by smoke and soot from a lamp whose flame flared up above the lamp. *United L., F. & M. Ins. Co. v. Foote,* 22 Ohio St. 340, was a case of explosion excepted from the policy, and it was held that the fire was caused by the explosion; therefore the loss was occasioned by explosion. *Renshaw v. Fireman's Ins. Co.* 33 Mo. App. 394, is also an explosion case caused by ignition from a burning gas jet, and it was held that where the explosion is the direct result of the antecedent fire the policy covers it, but where the explosion is not occasioned by the fire there is no liability for the result of the explosion. In the one case the fire causes the explosion, and in the other the explosion causes the fire. *Briggs v. North A. & M. Ins. Co.* 53 N. Y. 446, is a case where the explosion was before the fire and not caused by the fire. *Transatlantic F. Ins. Co. v. Dorsey,* 56 Md. 70, was a case of explosion, and the main question was whether the fire was the direct cause of the explosion. 1 Wood on Fire Insurance (2d ed.) sec. 103, it is true lays down the general rule that no liability arises where the fire is confined within the limits of the agencies employed, referring to the case of *Austin v. Drew,* 4 Camp. 360, with the observation that the doctrine of that case had been considerably misconceived by courts and text-writers. *Gibbons v. German Ins. & Sav. Inst.*

30 Ill. App. 263, was a case of damage caused by the escape of steam. *Case v. Hartford F. Ins. Co.* 13 Ill. 676, discusses *Austin v. Drew, supra,* and discards the idea that there can be no loss by fire without actual ignition. *Millaudon v. New Orleans Ins. Co.* 4 La. Ann. 15, is a case where the damage was caused by the explosion of a steam boiler; while in *Waters v. Merchants' L. Ins. Co.* 11 Pet. 213, an explosion of gunpowder is held to be a loss by fire where the thing exploded was on fire. *American T. Co. v. German F. Ins. Co.* 74 Md. 25, 21 Atl. 553, was a case of overheated boiler owing to the absence of water. *Austin v. Drew, supra,* is referred to, and it was held damage not covered by the policy. *Cannon v. Phœnix Ins. Co.* 110 Ga. 563, 35 S. E. 775, is a case where the fire was an ordinary fire in a stove. The fire was what is termed in law books a "friendly" and not a "hostile" fire. In this case the stovepipe became disarranged and smoke and soot escaped, together with the water used in cooling the ceiling causing the damage. *Austin v. Drew, supra,* is cited in support of the opinion.

It will be seen from the foregoing cases relied upon by appellant that the cases in this country in any way tending to support appellant's contention rest upon the doctrine of *Austin v. Drew,* which has not been extended, but limited to the particular facts of the case, and the doctrine enunciated therein criticised in some well-considered cases. We shall briefly refer to some of the authorities. At page 929, § 402, Mr. May in his work on Insurance discusses the doctrine laid down in *Austin v. Drew* and concludes that if the doctrine in that case is intended to go farther than the facts of the case it has been deemed not to be good law by every high authority. In *Scripture v. Lowell M. F. Ins. Co.* 10 Cush. 356, the doctrine of *Austin v. Drew* is explained, and the court says that lack of study of the case by courts and text-writers has caused it to be misapplied, and refers to the language of the Lord Chief Justice in *Austin v. Drew* to the effect that

the fire was an ordinary one and no more than always existed when the manufacturing was going on. *Singleton v. Phenix Ins. Co.* 132 N. Y. 298, 30 N. E. 839, is a case where a boat was loaded with quicklime in barrels. The boat was found to be on fire through the slacking of the lime. It was towed into the river and sunk to prevent total destruction. It was claimed that some water in the boat must have caused the slacking of the lime. Held, that the loss was by fire within the meaning of the policy. Further intimated that it may not be necessary to show actual ignition or combustion to establish a loss by fire. In *Way v. Abington Mut. F. Ins. Co.* 166 Mass. 67, 43 N. E. 1032, fire in the stove ignited the soot in the chimney, and the smoke and soot from the burning chimney escaped into the room and damaged property. Held, that such damage was covered by the policy insuring against all loss or damage by fire. The case seems to have turned upon the fact that the fire in the chimney was a "hostile" fire; therefore the damage caused by such fire was covered by the policy. In *Lynn G. & E. Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 35 N. E. 690, it was held under an insurance policy against loss or damage by fire that damage to machinery in a part of the building not reached by the fire, caused by short circuiting of electric current, was covered by the policy. It was further held that the fire was the direct and proximate cause of the damage under the words of the policy, "direct and proximate cause." In *California Ins. Co. v. Union C. Co.* 133 U. S. 387, 10 Sup. Ct. 365, the words of a policy, "direct loss or damage by fire," are defined to mean loss or damage occurring directly from fire as the destroying agency in contradistinction to the remoteness of fire as such agency. In *German Am. Ins. Co. v. Hyman,* 42 Colo. 156, 94 Pac. 27, under an insurance policy providing that the insurer would not be liable for loss by explosion, it was held that if the fire precedes the explosion and the latter is an incident of the former and

caused by it, the insured may recover for his entire loss, but if the explosion precedes the fire and is not caused by it the insured can only recover for the loss by fire. In *Russell v. German F. Ins. Co.* 100 Minn. 528, 111 N. W. 403, it is held that to render a fire the immediate or proximate cause of the loss or damage it is not necessary that any part of the insured property actually ignited or was consumed by fire. In *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 65 N. W. 635, the action was on a policy insuring plaintiff "against all direct loss or damage by fire," and the policy further provided that if the building fell "except as result of fire" the insurance on the building should immediately cease. There was evidence tending to prove that a building adjacent to the one insured caught fire and was partially consumed, and as a result of such fire fell, carrying down with it a partition wall and a part of the insured building. Held, that the fall of the insured building was "the result of fire" and "a direct loss or damage by fire," although no part of it ignited or was consumed by fire. Cameron in his work on the Law of Fire Insurance in Canada, page 51, discusses the effect of the word "direct" in policies providing against "direct loss or damage by fire," and says that the word has no significance or value, and whether used or not the fire must be the proximate cause of the loss or damage. See, also, Richards, Ins. Law (3d ed.) § 231, where it is said that the word "direct" in a policy means immediate or proximate as distinguished from remote, but that the proximate results of fire may include other things than combustion, as, for example, the resulting fall of a building, injuries to insured property by water, loss of goods by theft, exposure of goods during fire. See, also, Elliott, Ins. § 221, and Clement, Fire Ins. as a Valid Contract, 84–87.

The foregoing cases, we think, fully show that *Austin v. Drew,* 4 Camp. 360, is not authority against plaintiff here. There the fire was under control, not excessive, and suitable

and proper for the purpose intended. It was, in the language of the books, a "friendly" and not a "hostile" fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used. Such a fire was, we think, a "hostile" fire and within the contemplation of the policy. Ordinarily the question in such cases is for the jury. *New York & B. D. E. Co. v. Traders' & M. Ins. Co.* 132 Mass. 377; *New York & B. D. E. Co. v. Traders' & M. Ins. Co.* 135 Mass. 221; Richards, Ins. Law (3d ed.) § 231. But in this case the evidence being practically undisputed, we think no error was committed in directing a verdict for the plaintiff.

By the Court.—The judgment of the court below is affirmed.

The following opinion was filed November 13, 1909:

MARSHALL, J. (*dissenting*). I do not understand either the facts of this case or the law to be, in all respects, as indicated in the court's opinion. The court's language would indicate that, while there was no ignition outside the furnace or its connections, there was considerable burning to the extent of expelling volatile matter from paper, furniture, and mop boards, so as to create on their surface charcoal. "They were burned, charred, and blistered," is the language used, "though there was no ignition outside of the furnace." That language suggests that actual fire reached the injured parts of the house and furnishings so as to cause burning. I do not find that in the record. Here is all the record discloses, substantially in the language of the plaintiff: In the corner of the room around the register on the second floor, it was all burned, and the mop board blistered, and the wall paper was charred and burned to a perfect brown, and around the chimney was cracked in four or five places by the heat.

I did not see where any furniture was burned. I suppose it was damaged by heat; by the heat affecting the coal smoke which settled on the furniture. The heat seemed to make the smoke oily. Nothing in the house was set on fire. I think fire went up the registers by the way the wall paper looked and the mop boards. There was no burning other than the charring. There was no ignition except in the furnace. I do not know whether there was merely heat or was flame in the register. At the close of the plaintiff's evidence a question was propounded to him, as if he had testified the chimney was cracked, when he said he supposed that only the paper on the chimney was cracked. There was other evidence, fully corroborating that of plaintiff, that the fire was wholly confined to the furnace and its connections; that, at most, heat radiated therefrom with sufficient intensity to slightly char and blister mop boards and paper around one register; and that the chimney became so overheated as to cause the paper on the outside of it to crack. The damage was wholly by the radiated heat and there was no burning to the extent of charring, except of a trifling nature. The damage, except as to such trifling character, was caused by oily smoke which escaped from the furnace and its connections and discolored paper and furniture. That is the way I read the record.

Now the question is this: Is injury to the finish of a building by the radiation of heat from the house-heating furnace and its connections and escape therefrom of smoke, caused by a negligent fire in the furnace, the injury being to the extent of some slight charring and blistering of woodwork and paper near one or more of such connections, and cracking of paper and discoloration thereof and of furniture by the smoke, "direct damage by fire," within the meaning of the policy?

In solving the question suggested, other than to show exclusion of the particular case from the hazard insured against, it seems useless to refer to any case where there was actual

fire, ignition, and burning followed by an explosion, or explosion followed by fire, or fire outside its ordinary place, such as a furnace or stove, or fire causing the building ignited, or a part of it, to fall and injure another building, or fire caused entirely outside a furnace or other ordinary and proper place, thereby injuring insured property, or injury to one part of a building from accidental fire in another outside of an ordinary place therefor.

None of such situations, in my judgment, have any bearing on the case before us, and if used to show liability in the particular instance, only tend to confuse.

True, where there is a fire followed by an explosion causing loss, the damage is the direct though not the nearest cause of the loss. If it is the direct cause, in the sense of the result reaching back by a chain of causation to the fire as the efficient cause, it is the proximate cause in the sense the words of the insurance contract "direct damage by fire" are used. That is illustrated by *United L., F. & M. Ins. Co. v. Foote,* 22 Ohio St. 340, and similar cases.

Where there is an explosion followed by a fire, the latter, though the nearest, is not the direct, in the sense of being the proximate, cause. That is illustrated by *Transatlantic F. Ins. Co. v. Dorsey,* 56 Md. 70, and similar cases. In such situations as the former, the fire and damage are mere incidents of the explosion; in the latter, the explosion and damage are mere incidents of the fire. But, as before indicated, neither situation, nor any of those suggested, it seems, has any similarity to a case of damage caused by an excessive and dangerous radiation of heat from a furnace and its connections, and escape of smoke and fire caused by the negligent placing of an unusual fire therein, such damage consisting of some trifling charring of a part of a structure, adjacent to some of such connections, and discoloration of finishing and furniture by smoke.

Precedents properly used are helpful. Improperly used

they are not. They may, and are quite likely to, be the very opposite. If each case was decided by squaring it, as near as might be, with some particular previously decided case, or several of them, unmindful of the underlying controlling principles, with the humane leanings which characterize judges, as well as others, in favor of the weak and humble, and perhaps properly in cases of reasonable doubt, the human inclination so admirable, would be liable to create doubts in the mind where none need to exist, in fact, resulting in a decision now and another then, and again another, and so on *ad infinitum,* each on some more or less extreme view, and the unwritten law would become as a kaleidoscope, presenting, as handled, an endless variety of situations fitting, apparently, with most delightful similarity, causes as they arise, leading to results entirely out of harmony with that definiteness of rule which dignifies the law as a science.

So it seems we must look to the precedents, many of which are found in the opinion, not to see what is indicated in any particular case under particular facts, but to discover the logical basis of all—the underlying principle. Having discovered that and tied firmly to it, we can proceed with considerable certainty to a correct result. Having started with the basic member of our syllogism, we can proceed with logical steps to an inevitable conclusion, with the certainty of true logic.

What is the basic theory of the cases cited in the court's opinion? Though it seems not to have been kept clearly in view in every instance, is it not that, the term of the policy in question, "direct loss or damage by fire," excludes fire so long as it is confined to its appropriate place, as a stove or furnace, and contemplates fire as a producing cause existing outside of any such place. It is, seemingly, conceded that those words do not mean a fire, so long as confined in its appropriate place. So the proximate resulting loss must refer to a proximate cause fire, and if, following back from the

former, we must reach the fire in the stove before we find any fire at all, how can we well say that the loss was proximately caused by fire? What is the logic of the numerous explosion cases cited in the court's opinion? Is it not this? If following back, step by step, from the injury we reach the explosion as a mere link in a chain, starting with a fire which, had it immediately caused the loss, would be within the field covered by the policy, that there is responsibility of the insurer; if, on the other hand, in tracing back to the real origin of the loss, we pass the fire and reach the explosion as a producing cause, which is not within the risk covered, then the fire is a mere incident or link in the chain of causation, terminating with the explosion as the proximate cause of the disturbance; of the injury itself at the other end of the chain. In substantially every one of the cases cited, and a multitude that might be referred to, the proximate cause was fire of a responsible character, as regards the insurance risks; not fire in a stove or a furnace, though, in many, there was a chain of disturbances reaching therefrom to the disaster, as in the case of the fire in *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 65 N. W. 635. In this case there was a fire in a building of a character, within the terms of the insurance policy, which so destroyed the building as to cause a wall thereof to fall and injure the adjacent insured building. Had the fire been wholly in a furnace, resulting in such overheating and such radiation of heat as to cause the wall to fall, carrying down in part the adjacent building, I apprehend no one would seriously have thought the loss was covered by the policy, because in tracing the result back to find the proximate cause, it would not have been found to be within the policy. With few exceptions, that test could safely be applied to all the cases. It follows the logic of *Austin v. Drew*, 4 Camp. 360, which, in my judgment, has never been criticised except as it has been misunderstood. It did not go on the mere fact that the fire was a usual and so "a friendly

fire," but upon the ground that the fire was in its proper place and all the results were mere incidents thereof, *i. e.* the proximate cause was the fire in the stove because there was no fire elsewhere.

As so much is said about *Austin v. Drew,* it may be well to show just what the facts and the decision were. There was an overheated stove, caused by negligent mismanagement of it, as in this case. It matters not that the mismanagement there was in producing overheating and causing smoke, heat, and sparks to escape into the building, but without producing any fire outside of the stove or its connections, by failure to properly manipulate the register, and that substantially the same results were produced here by mismanagement of the fire itself. The court now puts some stress on the fact that Gibbs, C. J., said, in the opening part of the opinion, that the fire itself was not unusual. But that is not the gist of the decision. It is that nothing outside the stove was, by fire outside thereof or otherwise, consumed. This language was used: "Nothing was consumed by fire. The plaintiff's loss arose from the negligent management of the machinery" (referring to the connections of the stove). While the judge was pronouncing his opinion he was thus interrupted by a juryman:

"If my servant by negligence sets my house afire, and it is burnt down, I expect, my Lord, to be paid by the insurance office," etc.

To which the Lord Chief Justice replied:

"And so you would, sir; but then there would be a fire, whereas here there has been none. If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. . . ."

Thus it will be seen that the real gist of the decision is in the language, "Had the fire been brought out of the flue and anything had been burnt, the company would have been liable." The logic of that is this: Then there would have been a fire within the calls of the policy, which would be referred to as the proximate cause of the loss. To that extent the doctrine of that case has not been criticised in any well considered opinion, or by any text-writer understandingly.

It should be noted that, in *Austin v. Drew,* actual ignition outside the stove was not made a condition precedent to a recovery, but fire outside was made such condition. There might be fire outside and burning, in the most restricted sense of the term, without ignition, and the policy would be satisfied; but, in case of burning without any fire outside, burning to the extent of mere charring produced by radiated heat from the surface of the stove and its connections, then the policy would not be satisfied. Where the attempt has been made to extend the *Drew Case* so as to call for *fire outside the stove and actual ignition,* it has been generally, and properly, unsuccessful. If it has ever been criticised or limited so as to allow a recovery where there was no fire outside the stove or furnace, and no burning, otherwise than a little charring and discoloration by radiated heat from a stove and its connections, or to allow a trifling injury of that kind to draw to it and include a far greater damage, caused by mere heating, without burning in any sense, and damage from smoke, caused by fire inside the stove, I have been unable to discover it, and the court has not been any more successful, as indicated by the cases relied on.

Joyce on Insurance, at sec. 2796, citing numerous authorities, adopts the rule of *Austin v. Drew,* as I have explained it, as regards all damages caused by overheating and smoke produced wholly by fire, whether negligently handled or not, in a place where it may properly be.

In 1 Wood on Fire Insurance (2d ed.) sec. 103, *Austin v.*

Drew is referred to, as to all such injuries as we have in this case; this language being used:

"In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not *purposely* caused by the assured, and these, as a consequence of such ignition, *dehors* the agencies."

It should be noted that while Mr. Wood says there must be actual ignition outside of the usual agencies, he does not, necessarily, and I think does not in fact, mean ignition of the insured property. He means no more than that there must be actual fire outside of such agencies, and that such fire must proximately cause the loss.

2 May on Insurance (4th ed.) § 402, inferentially criticises the text in Wood upon the theory that it is to the effect that actual ignition of property insured is a condition precedent to a recovery, in a case of this sort, and argues, from authority, that damage by fire is within the terms of an insurance policy containing language similar to the one before us, although there is no ignition of any property covered by the policy, illustrating by cases of actual fire which would be within the risk in case of its immediately causing the damage, and proximately did cause it without combustion of any part of it, as where a fire originated outside a theater, heated its walls, and set them on fire. *Sohier v. Norwich F. Ins. Co.* 11 Allen, 336. Damage by fire originating in the theater was excepted from the policy. As we may well say, fire originating and kept in the house furnace was, by necessary implication, excepted from the policy here. It was because there was fire outside the excepted zone, which reached the theater and caused the damage, that the recovery was allowed. Such illustrations, instead of condemning, rather support the text in Wood as to the scope of *Austin v. Drew,* properly understood.

In *Scripture v. Lowell Mut. F. Ins. Co.* 10 Cush. 356, many of the erroneous notions of the scope of *Austin v. Drew,*

which have misled text-writers and courts, are referred to. It is shown that some have supposed the decision went upon the ground of carelessness of servants; others that it went upon the ground of damage to things in process of manufacture by means of the fire in the stove; and others that it went on the ground of there having been no ignition of any property covered by insurance. CUSHING, J., after repudiating all of such notions as illegitimate, stated what was decided, as confined to the facts, but plainly pointed out the real rule of the case by saying:

"If, in *Austin v. Drew, the fire had been where it ought not to be,* if, even with careless management, it had burned the building, . . . the insurers would have been held to be liable for the loss."

In other words, *if the fire had escaped from the stove and anything had thereby been burned the loss would have been recoverable.*

That is in harmony with the following: *Babcock v. Montgomery Co. Mut. Ins. Co.* 6 Barb. 637; *Gibbons v. German Ins. & Sav. Inst.* 30 Ill. App. 263, 265; *Western W. M. Co. v. Northern Assur. Co.* 139 Fed. 637; *Cannon v. Phœnix Ins. Co.* 110 Ga. 563, 35 S. E. 775; *Samuels v. Continental Ins. Co.* 2 Pa. Dist. Rep. 397.

The text in Wood on Insurance, in the sense intended, has been many times sanctioned. The following language of the court in *American T. Co. v. German F. Ins. Co.* 74 Md. 25, 21 Atl. 553, is a good illustration:

"If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney, or to warp or crack his mantlepieces, it could hardly be contended that he should hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of fire. In such case the fire would not have been extended beyond the proper limits within which it

was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured.

"No doubt there are many instances where the insurer has been held liable for injury done to buildings and furniture by heat or smoke, *without actual ignition,* where the heat or smoke has proceeded from fire outside of and beyond the limits of the place where it was intended, by the contract of insurance, to burn. But that is a different question. . . ."

That Mr. Wood did not intend that there must, necessarily, be ignition of the property insured as a condition precedent to a recovery, but only that there must be a fire at least outside its proper place, and cause the damage, proximately, either by charring or smoking or unduly heating with or without ignition, of the property insured, or ignition of some other property and proximately reaching and damaging the property insured by ignition or otherwise, is evidenced by the following language of sec. 104:

"There must be an accident by fire to lay the foundation of a claim. By this it is not meant that the property itself must have been on fire, but that there must have been either an ignition of the property itself, or of other substances or property nearby to it, which was the proximate cause of the loss. Fire [that is, as applied to the facts of this case, fire outside of the furnace] must have been the proximate cause of the loss. This rule does not require that the property itself should have been burned by the fire or even injured directly by the fire at all, but simply that the fire must have been the proximate cause of the injury."

That is, as applied to this case, fire, having an identity as such, and which could be pointed to as a proximate cause, outside of the furnace must cause the loss.

Mere charring does not require fire in the thing charred or direct application of fire. It is caused by fire, but not, necessarily, by fire outside its proper place, satisfying the calls of the policy. Such a fire requires luminosity outside its proper place. *Western W. M. Co. v. Northern Assur. Co.* 139 Fed. 637. Without that there may be charring by radiated heat

from some luminous substance inside its proper place as in this case.

I must not pass the suggestion of the court that CUSHING, J., in *Scripture v. Lowell Mut. F. Ins. Co.* 10 Cush. 356, stated that the logic of *Austin v. Drew,* 4 Camp. 360, is that the fire in question was an ordinary fire. I do not so read Justice CUSHING'S language, as I have before indicated, but rather that the learned Massachusetts court, in addition to limiting the decision to precise facts, damage to things in the process of manufacture by a negligently managed fire in its proper place, said, as plainly, it seems, as need be, that the gist of the decision is, that there was no fire at all outside its proper place.

In *Way v. Abington Mut. F. Ins. Co.* 166 Mass. 67, 43 N. E. 1032, there was a fire started in a chimney, causing the lining thereof to fall, and soot and smoke to escape and damage the insured property. I assume my brethren relied much on that. It is, however, in perfect harmony with *Austin v. Drew,* and also with *Cannon v. Phœnix Ins. Co.* 110 Ga. 563, 35 S. E. 775, conceded, as I understand it, to be against the conclusion here and in harmony with all that I have said. The Massachusetts case went upon the ground that the chimney was no proper place for a fire; that when it started it was an independent cause, one separate and distinct from the fire in the stove, and outside the proper place for a fire and so was within the risk insured against; that the ignition within the chimney being a sufficient fire to satisfy the calls of the policy, no ignition outside thereof was necessary to a recovery. *Austin v. Drew* was approved and followed. The court seemed to appreciate that it was going a great way to include fire in a chimney, incidental to a fire in a stove, within the meaning of "fire" as used in a policy of insurance, yet was careful to dignify it as a fire separate and distinct from that in the stove, before concluding that there could be a recovery. "We are inclined to the opinion," said the court, "that a dis-

tinction should be made between a fire intentionally lighted and intended for a useful purpose in connection with the occupation of a building, and a fire which starts without human agency in a place where fires are never lighted nor maintained."

I am unable to discover any authority cited which comes as near supporting the decision from which I dissent as the one just referred to. That, however, as is the case with all others, clearly involved actual fire within the calls of the policy, which immediately and proximately, or the latter, caused the damage.

In closing I will notice that the fire in question is referred to as "unusual," as if that took the case out of *Austin v. Drew.* That theory was repudiated in *Scripture v. Lowell Mut. F. Ins. Co., supra,* recognized here and by most text-writers and courts as having stated clearly the gist of *Austin v. Drew,* and fenced out the numerous erroneous theories indulged in by some, as a basis for criticism, or decisions one way or the other, according to circumstances. The fire is also referred to as a "hostile fire," adopting language coined by the Massachusetts court in *Way v. Abington Mut. F. Ins. Co., supra,* as if, within the doctrine of that case, a fire built in a furnace and confined thereto may become a "hostile fire" merely by becoming uselessly and negligently too large. The term "hostile fire" is misapplied, it seems, here. It was used by the Massachusetts court as an appropriate characterization of a fire started accidentally in a place not designed for that purpose. Obviously, if in that case the fire had been started by the assured in the chimney, it would not have been called a "hostile fire," and within the calls of the policy, merely because it became unexpectedly large and destructive. It was suggested in the opinion that had the fire been set in the chimney it would not have been what was denominated a "hostile fire."

The importance of the subject treated justifies, it is

thought, the length of this opinion. If I am right in the idea that the court has gone beyond any substantial support in the books, especially in allowing the recovery for damages wholly caused by radiated heat, without even charring, and by smoke, what I have written may be helpful when the question shall again be presented.

The opinion written for the court, doubtless, supports the decision rendered as fully as it can well be done. It states clearly the court's position that radiated heat and smoke from a fire, wholly confined to a furnace in which the fire is made for an ordinary purpose, causing charring of house finish and discoloration of woodwork and furniture, is within the calls of the standard policy of this state for a remediable loss directly caused "by fire."

In my opinion, the judgment should be reversed, and the cause remanded for a new trial, or for judgment for the defendant. It has not been necessary to study the case carefully to discover which of the alternatives is the right one.

MONTURE, Respondent, vs. REGLING and another, Appellants.

October 5—October 26, 1909.

Sales: Pleading construed: Special verdict: Evidence of market value: Appeal: Errors affecting substantial rights.

1. The complaint alleged that the defendant was indebted to the plaintiff for thirty-four loads of gravel "hauled and delivered" at $2.50 per load "for hauling the same." The answer admitted this, but averred that the agreed price was $2 per load. At the trial the complaint was amended so as to claim what the gravel was reasonably worth per load. The court construed the complaint, taken with the answer and the evidence, to present a case for the recovery of the reasonable market value of the gravel sold and delivered by the load, and not an action on contract for services performed. *Held*, that there was sufficient

duplicity in the pleadings to make this construction admissible and conclusive on the parties on appeal.

2. Under such pleadings, questions submitted for special verdict asking whether there was an express agreement for $2 per load, and, if not, what was the reasonable value per load, sufficiently covered the issues.

3. To establish the market value of gravel sold and delivered by the load to the defendant, plaintiff introduced evidence as to what other persons had paid him per load and of the comparative size of the loads. *Held*, that such evidence was incompetent because going farther than general evidence of sales and tending to prove the terms of specific contracts with other persons; but, its introduction having been permitted, it was error to exclude testimony, offered by defendant in rebuttal thereof, that as to some of such sales the amount paid was less than plaintiff's evidence showed, and that the loads delivered to defendant were smaller than those delivered to the other persons.

4. Where erroneous rulings on evidence vitally affect the whole amount in controversy the judgment cannot be affirmed under ch. 192, Laws of 1909, on the ground that the substantial rights of the appellant are not affected, although the actual difference between the parties will not cover the cost of a new trial; nor can the appeal be dismissed or the judgment be affirmed under the rule *de minimis non curat lex*, so long as the parties have the right of appeal regardless of the amount involved.

Appeal from a judgment of the circuit court for Shawano county: John Goodland, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Eberlein & Eberlein*, and oral argument by *M. G. Eberlein.*

P. J. Winter, for the respondent.

Timlin, J. The complaint averred that the defendants were indebted to the plaintiff upon an account for thirty-four loads of gravel hauled and delivered by the plaintiff to defendants at request of the latter for the agreed price of $2.50 per load. The answer admitted this, but averred the price agreed upon was $2 per load and was all paid except $38. Upon the trial the complaint was amended so as to claim to recover what the gravel was reasonably worth per load instead of an agreed price. By special verdict the jury negatived the

claim of defendants that there was a price fixed by contract, but found that the reasonable value of the gravel delivered was $3 per load. For the amount thus arrived at, less conceded payments, the plaintiff had judgment and the defendants appealed.

It might, not unreasonably, be supposed that in such a case the parties would be content with two trials—one in the justice's court and one in the circuit court. But in this state a party to any such controversy, without regard to the amount involved and without inquiry into his discretion or his motives, may gratify his yearning for justice or for litigation by appeal to this court, and receive the same careful consideration accorded to other litigants.

It must be obvious from the above statement of the pleadings that the only question at issue between the plaintiff and defendants was whether there was an agreement that the gravel be delivered at $2 per load or at its market or reasonable value, and, if the latter, what was the market value. It appeared from the testimony of appellants that they purchased this gravel by the load, receiving these loads from time to time until about September 12th, when one of the defendants asked the plaintiff if he was going to charge $3 per load. The plaintiff said "Yes," whereupon he was notified not to haul any more and no more was hauled.

Appellants' counsel contends that in the trial of this simple question ten reversible errors occurred in the court below. The first is because judgment was not directed for defendants. But judgments are not usually directed for defendants who by their answer admit liability to the plaintiff, as in this case. It is contended that the action is upon a contract for services performed and not a contract for sale of gravel by the load, and that there is no proof of the reasonable value of the services performed. But the proposition that the contract is one for services rests upon the words of the complaint, "hauled and delivered," used instead of the customary words,

"sold and delivered," and upon the words "$2.50 per load for hauling the same." The circuit court construed the complaint, taken with the answer and the evidence, to present a case for the recovery of the reasonable market value of gravel sold and delivered by the load, and there is sufficient duplicity in the pleading to make this construction admissible and conclusive on the parties on this appeal. All alleged errors bottomed upon this theory must fail. The special verdict is said to be defective and insufficient, but by that verdict the jury were asked whether there was an express agreement for $2 per load, and, if not, what was the reasonable value per load. This covered the issues precisely, and the court was justified in refusing to submit any other questions.

It is next claimed that the court erred in receiving evidence offered by the plaintiff and in rejecting evidence offered by the defendants. The plaintiff was asked what was the market value of gravel, and what was it reasonably worth per load delivered in the city of Shawano, and he answered $3 per load. After cross-examination the plaintiff's attorney did not seem satisfied with this, and inquired further on redirect examination: "*Q.* You hauled gravel to different people in Shawano? *A.* Yes. *Q.* What had you received per load for gravel?" This was objected to, the objection overruled, and the defendants excepted. The plaintiff answered, "$3." He was then asked whether these loads were of the same size as those hauled for defendants, and against objection and exception he answered "Yes."

This testimony received, if not incompetent, borders closely upon incompetency. If it can be considered proof of market value by the general or prevailing price obtaining at Shawano for this commodity it would be proper; but if it can be considered an attempt to prove the terms of specific contracts with other persons it would be incompetent. The plaintiff afterward called several persons to show what they were

paying him per load for gravel in Shawano and about the time in question. When the defendants put in their proof they offered to show by a witness on the stand that as to some of these persons the plaintiff was not receiving $3 per load for the gravel delivered, and also offered evidence tending to show that the loads of gravel delivered by the plaintiff to defendants contained much less than two cubic yards per load, that gravel was worth in Shawano only $1.25 per cubic yard, and the loads delivered by plaintiff to defendants were small loads, smaller than those delivered to other persons. This testimony was rejected, the view of the trial court apparently being that the testimony offered by plaintiff was merely general and for the purpose of establishing the market price, while that offered by defendants was specific and related to particular contracts, and that the contents in cubic yards or cubic feet of a load could not be proven as bearing upon the market price because there was no objection made to the size of loads at the time the defendants received them, while defendants' pleadings admitted a purchase by the load. The learned circuit judge was probably in error, not in his ruling on the evidence had it been as he understood it, but the evidence goes farther on the part of the plaintiff than general evidence of sales, and the evidence offered by defendants and rejected tended to contradict the statement of the plaintiff that he was receiving $3 per load from a person designated by him, and to prove that the loads delivered by plaintiff to defendants were small loads and consequently worth less than $3 per load. The plaintiff in proving the market or reasonable value per load offered evidence of the comparative size of the loads delivered. Evidence on the part of the defendants to show a less quantity in a load and to show discrepancy between sizes of loads delivered to defendants and those delivered to other persons from whom plaintiff was receiving $3 per load was competent and should have been received, not in

support of defendants' answer, but in rebuttal of plaintiff's evidence on this same subject. There was therefore error as assigned in the admission and rejection of evidence.

We are required by ch. 192, Laws of 1909, to affirm the judgment of the court below notwithstanding these errors, unless in our opinion, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the appellants. The actual difference between appellants and respondent is fifty cents per load on thirty-four loads of gravel, or $17, because the $3 per load which the jury found to be the reasonable value included fifty cents per load to be paid by the respondent to the owners of the gravel pit, while the $2 per load claimed by defendants in their answer excluded fifty cents per load to be paid by appellants to the owners of the gravel pit. Doubtless the whole difference of $17 will not cover the cost of a new trial; but, as the evidence erroneously admitted and erroneously excluded vitally affects the whole amount in controversy between the parties, we cannot say that the substantial rights of the appellants were not affected, nor can we dismiss the appeal or affirm the judgment by application of the maxim *de minimis non curat lex,* so long as the parties have a right in the law to appeal to this court on the ground of error in an action at law regardless of the amount involved.

We find no reversible error in the instructions to the jury, nor in the form of the special verdict, nor in any other question properly before this court for review. But for error in the admission and exclusion of evidence the judgment must be reversed. *Kelley v. Schupp,* 60 Wis. 76, 18 N. W. 725; Jones, Ev. § 140, and cases cited.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

SEERING, Respondent, vs. BLACK, imp., Appellant.

October 5—October 26, 1909.

Corporations: Dissolution: Refusal of directors to settle affairs: Winding-up action by stockholder: Pleading: Joinder of causes of action: Rights of creditors.

1. Where the directors of a dissolved corporation have wholly failed and refused to perform the duties imposed by sec. 1764, Stats. (1898), to settle its affairs and distribute its assets, thus depriving a stockholder of his share of the assets and correspondingly enriching themselves, the stockholder may maintain an action in equity to wind up the affairs of the corporation and for the appointment of a receiver to perform the functions which the directors have refused to perform.
2. In such an action there was no impropriety in alleging that plaintiff was also a creditor of the corporation and in setting forth a fairly complete history of its condition and affairs.
3. Although the prayer of the complaint in such an action might be considered as asking for relief which could not be granted therein, viz., a money judgment in favor of plaintiff as a creditor and a like judgment in favor of the corporation against its officers, yet it might also be construed as asking merely that the claims so involved be duly paid or enforced by the receiver, and, so construed, the complaint states but a single cause of action.
4. The mere fact that unnecessary or even improper relief is prayed for does not show that more than one cause of action is stated.

[5. Whether a creditor other than a judgment creditor may maintain an action to wind up the affairs of a corporation dissolved by operation of law, not determined.]

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to a complaint.

The complaint set forth that Black Brothers Company was a domestic corporation organized in June, 1906, with an authorized capital of $30,000, for the purpose of conducting a mercantile business, and that $21,000 in capital stock was issued, of which the plaintiff held $7,000, *John Black*

$6,900, Mary Black, his wife, $100, Joseph Black $6,900, and Nellie Black, his daughter, $100; that each of the stockholders was a director in the corporation; that *John Black* was president and Joseph Black was secretary and treasurer, and that plaintiff was vice-president thereof; that on October 22, 1906, said corporation sold all of its property except book accounts owing to it and has transacted no business since said date; that said corporation failed to make the report required by sec. 1774*a*, Stats. (Supp. 1906; Laws of 1905, ch. 507, sec. 5), showing the condition of its business on January 1, 1907, and that, by appropriate proceedings had in pursuance of such statute, its franchise was forfeited on January 2, 1908, at which time it was dissolved by operation of law; that at the time of such dissolution there was due and owing to such corporation on account from the defendant Joseph Black the sum of $2,583.83, and from *John Black* the sum of $2,059.04, and in other accounts about $1,500, and that there was due and owing to plaintiff from said corporation the sum of $2,840 on an indebtedness duly assumed by the corporation; that the defendants Black had control of the board of directors of said corporation; that they are the principal debtors of said corporation and refuse to take any steps to collect the moneys due the same or to liquidate the indebtedness due plaintiff, and that due demand has been made upon them to perform their duties as officers and trustees of said corporation, but they have failed and refused to act, intending thereby to defraud the plaintiff of his rights as a stockholder and creditor of the corporation; and that it is necessary to appoint a receiver to marshal the assets of said corporation and wind up its affairs.

As relief the plaintiff asks (1) that a receiver be appointed to collect the outstanding debts and pay the accounts; (2) that the defendants, *John* and Joseph Black, be compelled to pay to the corporation the amount of their indebtedness thereto; (3) that the plaintiff have judgment directing the receiver to

pay over to him the amount found to be due from the corporation; (4) that plaintiff be paid the amount found due him on an accounting after the affairs of the corporation are wound up; (5) that the corporation be dissolved and its affairs settled up and that its assets be distributed; (6) that plaintiff have such other relief as may be equitable.

The defendant *John Black* demurred to this complaint on various grounds, but two of which are relied on: (1) That the complaint does not state a cause of action; and (2) that several causes of action have been improperly united. From an order overruling this demurrer said defendant appeals.

For the appellant there was a brief by *Eberlein & Eberlein,* and oral argument by *M. B. Eberlein.*

For the respondent there was a brief by *Paul J. Winter,* attorney, and *Greene, Fairchild, North & Parker,* of counsel, and oral argument by *Mr. Winter.*

BARNES, J. By sec. 1764, Stats. (1898), the directors of the dissolved corporation were continued in office for the purpose of selling and disposing of its property, collecting its debts, paying its obligations, and distributing its assets among its stockholders. *Lindemann v. Rusk,* 125 Wis. 210, 104 N. W. 119. Taking as a verity the averments of the complaint, the defendants have wholly failed to perform the duties imposed on them by law. By such conduct they are depriving the plaintiff of his share of the corporate assets and correspondingly enriching themselves. That a court of equity has power under such circumstances at the suit of a stockholder to entertain a winding-up suit and to appoint a receiver to perform the functions which the defendants have wrongfully and fraudulently refused to perform does not admit of doubt. 2 Cook, Corp. § 641; *Lindemann v. Rusk, supra; Elmergreen v. Weimer,* 138 Wis. 112, 119 N. W. 836. The complaint states sufficient facts to constitute a cause of action.

That the complaint does not improperly unite several causes of action is not so clear. An inference might well be drawn that a money judgment in favor of plaintiff as a creditor was sought in this action, and also that a like judgment in favor of the corporation was sought against *John* and Joseph Black on an ordinary account alleged to be due from them to it. Such relief cannot be granted in a winding-up suit. *Harrigan v. Gilchrist,* 121 Wis. 127, 240, 99 N. W. 909. Equity will entertain a suit by a creditor to wind up the affairs of an insolvent or of a dissolved corporation. *Killen v. Barnes,* 106 Wis. 546, 559, 82 N. W. 536; *Gores v. Day,* 99 Wis. 276, 74 N. W. 787. But we are not prepared to say that the general rule that only a judgment creditor may maintain such a suit is not applicable to a corporation dissolved by operation of law. The allegation in the complaint to the effect that plaintiff is a creditor is proper enough, even though he is not presently entitled to maintain the action as such. We see no impropriety in placing a fairly complete history of the condition and affairs of the corporation before the court in the suit of plaintiff as a stockholder. The ambiguity arises out of the demand for judgment. If the pleader intended to set out more than one cause of action, he did not follow sec. 2647, Stats. (1898), which requires that different causes of action be stated separately. We think the prayer for relief may be construed as a demand by the plaintiff that the receiver pay him the amount found to be his due, after he has filed his claim and proved it in the receivership proceedings in the manner provided by law, and that the defendants *John* and Joseph Black be obliged to pay to the receiver as the representative of the corporation the amount found to be due from them in an appropriate proceeding brought for the purpose of compelling such payment. So construed, the complaint states but a single cause of action. The mere fact that the plaintiff is asking for unnecessary or

even improper relief does not in itself show that more than one cause of action is stated.

By the Court.—Order affirmed.

TIMLIN, J. I concur in the opinion written by Justice BARNES, but I do not think it is an open question in this state whether a creditor who has not recovered a judgment can maintain such an action as this against such a corporation. I do not think any doubts on this barren, outworn, and quite useless technicality of practice should be revived, especially when the action is to enforce a trust or fiduciary duty. The statute is sec. 3223, Stats. (1898). The cases are *Sleeper v. Goodwin,* 67 Wis. 577, 31 N. W. 335; *Michelson v. Pierce,* 107 Wis. 85, 82 N. W. 707; *Booth v. Dear,* 96 Wis. 516, 71 N. W. 816, and other cases.

"Liability created by law." *Hurlbut v. Marshall,* 62 Wis. 590, 594, 595, 22 N. W. 852. This also has been since followed; all of which may be found by any one having the time and industry so to do.

MARSHALL, J., dissents.

GREEN BAY & MISSISSIPPI CANAL COMPANY, Appellant, vs. TELULAH PAPER COMPANY and others, Respondents.

October 5—October 26, 1909.

Mills and milldams: Navigable rivers: Flowage of lands: Limitation of actions: Prescription: Equitable actions: Statute construed: Lowering head at upper dam: Findings of fact: "Adverse" flowage: Landlord and tenant: Acquiring hostile title: Estoppel.

1. The words "any milldam" in subd. 3, sec. 4221, Stats. (1898),—first enacted as ch. 184, Laws of 1862,—do not relate merely to dams across nonnavigable streams authorized by ch. 146, Stats.

1898 (ch. 56, R. S. 1858), but include a dam built across a navigable stream for the purpose of creating water power to operate mills.

2. A dam erected to create power to operate mills, which power is used exclusively for that purpose, is a milldam within the meaning of subd. 3, sec. 4221, Stats. (1898), although the corporation erecting it has no power itself to operate mills, but merely leases or sells the power to mill owners while retaining title to the dam itself.

3. Subd. 3, sec. 4221, Stats. (1898), has the effect to confer title at the expiration of the ten years within which an action for damages for the flowing of lands by a milldam must be commenced, and bars, therefore, an equitable action to restrain the maintenance of the dam as well as an action for damages.

4. The raising, by a milldam, of the water wholly within the banks of a river, thereby lowering the available head of the water at an upper dam and covering with a greater depth of water the bed of the river at and below the upper dam, is a flowing of the lands of the owner of such upper dam and river bed, within the meaning of subd. 3, sec. 4221, Stats. (1898).

5. A finding by the court that for a period of more than ten years the setting back of the water upon plaintiff's land by defendants' milldam had been "uninterrupted, continuous, open, notorious, and adverse, and so as to maintain on plaintiff's land the same water level in the same stages of water," covered all the elements necessary to render operative the bar of subd. 3, sec. 4221, Stats. (1898).

6. The word "adverse" in such a finding, while it embodies a conclusion of law, is also a comprehensive statement of an ultimate conclusion of fact embracing all the elements necessary to make possession adverse.

7. Proof that a milldam was completed in a certain year, without fixing the exact date, does not show that an adverse flowage of land thereby began before the last day of that year.

8. The fact that for a part of the ten years during which, as defendants claimed, the lands of plaintiff, the owner of an upper dam, had been flowed by means of a lower dam, the general manager of one of the defendants acted as principal manager of the lower dam and was also general manager of a corporation which had leased from the plaintiff certain amounts of water power from the upper dam and certain lots below that dam, did not prevent the flowage from being adverse to plaintiff during the whole of said ten-year period, in the absence of a showing that the property so leased from plaintiff was in any way interfered with or encroached upon by the setting back of

the water from the lower dam. The doctrine that a tenant cannot deny his landlord's title or acquire a hostile title while the tenancy continues has no application to such a case.

9. The fact that a dam across a navigable river is an unlawful structure because it obstructs the river without legislative authority, does not prevent the acquirement by prescription of the right to maintain such dam as against individual owners of lands above the dam.

APPEAL from a judgment of the circuit court for Outagamie county: CHESTER A. FOWLER, Judge. *Affirmed.*

For the appellant there were briefs by *Quarles, Spence & Quarles,* attorneys, and *George Lines,* of counsel, and oral argument by *Mr. Lines.*

For the respondents there was a brief by *Hooper & Hooper,* and oral argument by *Moses Hooper.*

WINSLOW, C. J. In February, 1892, the plaintiff corporation, which is the owner of the surplus water power not needed for navigation purposes created by the Grand Chute or government dam in the Fox river at Appleton, brought this action in equity against the defendants, who own the dam immediately below the plaintiff's dam, and known as the middle dam at Appleton, and the water power created thereby, to restrain the defendants from maintaining said middle dam at its present height, claiming that the same unlawfully sets back the water of the river and flows the plaintiff's lands and water wheels to the depth of thirty inches. The trial court found that there had been, prior to the commencement of this action, ten years' uninterrupted and adverse user by the defendants of the said middle dam at the height at which it was maintained at the time of the commencement of this action, and thereupon dismissed the complaint, holding that the action was barred by subd. 3, sec. 4221, Stats. (1898), or, if not barred by this subdivision, then by subd. 4 of the same section. The plaintiff first contends that subd. 3, above mentioned, is not applicable

(a) because said section only applies to milldams across nonnavigable streams, and the Fox river is in law a navigable stream; (b) because the said middle dam is not a milldam in the usual and ordinary sense; (c) because this is not an action to recover damages; and (d) because no flowing of lands is involved. We will take up these propositions in the order indicated.

1. The subdivision named places, among the actions which must be brought within ten years after the cause of action accrues, "An action for the recovery of damages for flowing lands, when such lands have been flowed by reason of the construction or maintenance of any milldam." This section first appeared upon our statute books in 1862 as ch. 184 of the laws of that year, where it read as follows:

"No action for the recovery of damages for the flowing of lands shall be maintained in any court in this state, when it shall appear that said lands have been flowed by reason of the construction or erection of any milldam for the ten years next preceding the commencement of such action: provided, any party shall have one year from and after the passage of this act in which to commence an action for the recovery of any lands, tenements or hereditaments heretofore flowed, or for the recovery of the possession thereof, or for damages to the same."

The argument is that when this act was passed the word "milldam" had acquired a technical and special meaning in our law by reason of the existence of ch. 56, R. S. 1858, entitled "Of mills and mill-dams" (now ch. 146, Stats. 1898), and that this special meaning was and is confined to dams authorized by said chapter, to wit, across nonnavigable streams, and that the subsequent re-enactment of the section in substantially the same words in the revisions of 1878 and 1898 as subd. 3, sec. 4221, in no way changes the original special meaning. Doubtless the result would follow if the major premise were correct. R. S. 1878, sec. 4985; Stats. (1898), sec. 4985. But we see nothing to indicate that the

legislature in passing ch. 184 of the Laws of 1862 intended to confine the provisions of the act to milldams erected under the provisions of ch. 56 across nonnavigable streams; on the contrary, the argument seems to be the other way.

The act is general in its terms, and purports to bar an action after ten years' flowage by "any milldam." A dam which is built across a navigable stream for the purpose of creating water power to operate a mill is just as certainly a milldam as one built across a nonnavigable stream. So by its language the act covers one as well as the other. Courts certainly should not be industrious in seeking out obscure or unusual meanings to attach to statutory expressions, when the words used are plain and unambiguous and the ordinary meaning is entirely reasonable. Now, had the legislature desired and intended to confine the act to dams erected and maintained under the milldam law (*i. e.* dams across nonnavigable streams), the most obvious and natural thing would be to say so in direct language, and add the section to ch. 56 of the Revised Statutes of 1858, thus completing the special code governing the erection and maintenance of this class of milldams. This seems the more certain when it is remembered that there were many milldams in the state across navigable streams which had been erected under special legislative acts, and also that the milldam law, while first enacted in 1840, was repealed in 1850 and not re-enacted until 1857. During this interregnum the session laws fairly teem with special acts authorizing the erection of milldams, none of which, of course, were milldams in the technical and special sense claimed by the respondents here. It seems probable that at the time this act was passed there were full as many dams in the state which had been built outside of the provisions of the milldam law as under it. Undoubtedly the legislature knew this fact, and, so knowing, passed a law applying generally to any milldam "in the state." Upon principle it would seem that under these circumstances this law, framed

in unambiguous, general words, must have an interpretation just as broad and general as the words used commonly receive. Furthermore, the question seems to have been decided adversely to appellant in the case of *Ruehl v. Voight,* 28 Wis. 153, where the owners of a dam on Rock river, erected by virtue of a special act of the territorial legislature of 1845, pleaded this statute, and upon this exact point the court said:

"The language of the statute is clear, precise, and comprehensive, and bars every action where the lands have been flowed for ten years without any claim for damages. The statute means this, or it has no meaning whatever."

It is true that in that case the act authorizing the dam made it subject to the provisions of the milldam law then existing, but the decision was not placed on this ground, but on the broad ground that the language covered "any milldam" or none.

In *Cobb v. Smith,* 38 Wis. 21, which was an action of flowage caused by a dam erected on a navigable stream under express legislative grant, this statute of limitations was pleaded; and while it was held that the pleading showed that the use had not been adverse, still the court treated the statute as applicable to such a dam had the facts been sufficient.

2. The claim that the middle dam is not a milldam within the meaning of the word as used in the statute is based on the fact that it was built by the defendant the *Appleton Water Power Company,* a corporation organized for the purpose of constructing this dam "and for improving and creating water power and river lots in and near said water power and for holding and disposing of the same," and the further fact that it has no power to operate mills and does not do so, but has sold or leased the power created by the dam in parcels to the various other defendants for mill purposes, while retaining title to the dam itself. The argument does not appeal to us very strongly. It seems that a dam erected to create power to operate mills, which power is used exclusively to operate

mills, is logically and truly a milldam, notwithstanding the ownership of the dam and of the mills may be in different persons. It is true that this court has held that ch. 184 of the Laws of 1862 only applies to "milldams in the proper and strict sense of the words," and that a dam which was part of and necessary to a general scheme for the improvement of the navigation of a river, so as to make it a public highway, was not properly a "milldam" within the meaning of the law, though the power created by it might be used to operate mills. *Arimond v. Green Bay & M. C. Co.* 35 Wis. 41. The rule there laid down seems reasonable, but we do not perceive that it is applicable to the present case.

3. We agree with appellant's contention that this is not an action to recover damages, but rather an equitable action to enjoin the continuance of a nuisance, with an incidental claim for damages, but we cannot agree with the conclusion drawn therefrom to the effect that the limitation statute does not therefore apply. It is true that the law in terms only prohibits the bringing of "an action for the recovery of damages for flowing lands" after the expiration of the ten-year period, but this court has held that the effect of this statute is to confer title after the ten-year user is complete, on the principle that where (as in Wisconsin) the statute of limitations destroys the right as well as bars the remedy, that result must follow. *Johnson v. Boorman,* 63 Wis. 268, 22 N. W. 514. This ruling effectively disposes of this contention.

4. The contention that there is no flowing of lands within the meaning of the statute in the present case is yet to be considered. It appears that the setting back of the water by the defendants' dam is wholly within the banks of the river, so that no lands outside of the banks are overflowed, but the dam raises the water within the banks so as to lower the available head of the water power furnished by plaintiff's dam. Is this truly a flowing of lands? We think it is. To

hold otherwise would be to engraft a very narrow and technical meaning upon the statute. The plaintiff owns the lot upon the south side of Fox river upon which the south side of its dam rests, and the land for some distance below, and hence is a riparian owner. In this state the owner of a bank of a navigable stream owns to the center line (unless the ownership of the bank and the bed has been separated), subject only to the rights of the public. *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273. Hence the plaintiff owns the bed of the river at and below its dam, subject only to governmental and public rights. This bed is land. While ordinarily covered with water to some depth, the defendants' dam has covered it with water to a greater depth and rendered it less valuable to its owner. This is flowing of lands in every true sense.

But the appellant further contends that, even if the statute of limitations be applicable to such a case, the facts proven do not bring the present case within the statute. It is undoubtedly true that the user must have been adverse for ten years prior to the commencement of the action in order to raise the statutory bar. The court found that the setting back of the water by defendants' dam had been "uninterrupted, continuous, open, notorious, and adverse, and so as to maintain on plaintiff's land the same water level in the same stages of water" since the completion of the dam in 1877. These words include all the elements necessary to render the statute operative. If there were any doubt as to whether the words "uninterrupted, continuous, open, and notorious" covered the subject, that doubt would be removed by the addition of the word "adverse," which, while it embodies a conclusion of law, is also a comprehensive statement of an ultimate conclusion of fact embracing all the elements necessary to make possession adverse. We are entirely satisfied from examination of the record that the evidence fully justified the finding of the court in this regard, and we deem it unnecessary to make any review of such evidence.

But one contention which the appellant makes in this connection must receive attention. The contention is that the undisputed evidence shows that for a part of the ten years the possession and management of the defendants' dam was in the hands of a tenant of the plaintiff at the upper dam, and hence that the possession during such time could not be adverse because it was possession by plaintiff's tenant. The facts on which this claim is based are in brief as follows: The defendants' dam was completed some time in 1877, the exact date not being fixed by the testimony or the findings. Adverse holding under it is not therefore shown to have begun before December 31st of that year. This dam had a spindle section in the middle, by the removing or replacing of which the flow of water was regulated during high or low water. This spindle section and the regulation of the flow was in actual charge of one Cough. For some nine years after the completion of the dam he received his general directions from Mr. West, who was the original owner of the power and the principal stockholder in the *Appleton Water Power Company,* but the other defendants also gave him orders if they wanted any accommodations. At about the close of the nine-year period West sold to the Kimberly-Clark Company, and Mr. Charles B. Clark of that company took principal charge of the regulation of the flow and gave Mr. Cough his orders until 1888. There is no evidence showing that the defendant millowners ever directly authorized either Mr. West or Mr. Clark to act as principal manager of the dam. They seem to have volunteered to act rather than to have acted under any definite arrangement by the various millowners. The user was certainly a common user by all of the defendants. In 1879 the Atlas Paper Company became the tenant of the plaintiff at its upper dam by leasing certain amounts of water power and certain lots below the dam upon which it operated extensive mills. In 1891 it leased all of the power available at the dam. Mr. Charles B. Clark was general manager of the Atlas Paper Company during the

entire time that its leasehold interest continued. The defendant *Telulah Paper Company* built its mill in 1887 and began using water from the middle dam in 1888. Of the latter corporation Mr. Clark was also general manager.

The doctrine that a tenant cannot deny his landlord's title to the demised property during his tenancy, nor acquire a hostile title to the same while the relationship continues, is well settled. *Tondro v. Cushman,* 5 Wis. 279; *Sizer v. Clark,* 116 Wis. 534, 93 N. W. 539. The reason is that he has obtained possession by solemnly acknowledging that his landlord has title to the property leased, and hence that he is estopped by that fact from claiming that his possession of the leased property is adverse or that he has acquired a hostile and paramount title thereto.

Giving that principle its fullest weight, it does not apply here. It does not appear that the middle dam interferes in any particular with the property leased to the Atlas Paper Company prior to 1891. That property consisted only of certain lots below the plaintiff's dam, which of themselves carried no water power, coupled with a certain specified quantity of horse power of water from the dam. It nowhere appears that the property so leased was at any time or in any manner interfered with or encroached upon by the setting back of the water from the middle dam. Presumptively there was an ample supply and head of water at the dam to fill the calls of the lease, even when the water was set back by the middle dam. It is not shown, therefore, that the adverse holding by the defendants was in any way hostile or injurious to the property leased by the Atlas Paper Company.

It is further said that the defendants' dam is and was an unlawful structure because it obstructs a public navigable river without legislative authority, and hence it is argued that no right to maintain it can be acquired by prescription. This point was decided adversely to appellant's contention in the case of *Pioneer W. P. Co. v. Chandos,* 78 Wis. 526, 47 N. W.

661, where it was held that while in such a case the public right of navigation might not be barred, the rights of upper owners would be barred by failing to contest the question until the bar of the statute of limitations was complete.

No further points require attention.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

KATHAN and others, Respondents, vs. COMSTOCK and others, Appellants.

October 6—October 26, 1909

Contracts induced by fraud: Avoidance: False representations: Fact or opinion: Tax titles: Limitation of actions: Cancellation of deed: Judgment.

1. One who makes representations to another of material facts for the purpose of inducing that other to enter into contractual relations with him and which are liable to accomplish the purpose without want of ordinary care on the part of such other, is bound, not merely not to act negligently, but at his peril to know whereof he speaks.
2. One not himself knowing the facts involved may reasonably act on representations by another who desires to enter into contractual relations with him, as to conditions not presently observable.
3. Where the original owner of land had been in actual possession of it during the three years following the recording of a tax deed, thereby preventing the running of the statute of limitations in favor of the deed, a representation by the holder of the deed that the statute had run in its favor, made for the purpose of inducing a conveyance by the heirs of the original owner, was not a mere legal opinion but was a false representation of a fact material to the transaction and, even though made honestly, was such a fraud as in equity would render voidable a conveyance reasonably induced thereby.

4. Where in such a case the false representation was as to one only of several tracts covered by the conveyance, but there was no evidence enabling the court to apportion the consideration paid, and defendants had refused an offer giving them an option as to whether the conveyance should be set aside wholly or only as to the one tract, it was not error for the trial court to set aside the entire conveyance.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Equitable action to set aside deeds to real estate and quiet title.

The issues passed upon in closing the case by judgment may be concisely stated, as follows: The title to the particular land in question and others, aggregating twenty-two tracts, was in Joseph Kathan at the time of his death, May 26, 1901. He died intestate, leaving as his only heirs his widow, Hattie P. Kathan, and three minor children, the plaintiffs herein. The title to said land was vested in them on the death of Mr. Kathan, subject to six tax deeds thereon in the name of defendant *Pier*. The title to the particular tract was vested in Mr. Kathan many years before he died. It was occupied and used by him, in the main, as a wood lot and for cutting and removing timber therefrom, continuously, for several years after his ownership commenced. During such time a small part was cleared, cultivated, and inclosed by a fence. The land was thereafter used by Mr. Kathan, continuously, down to 1897 in connection with an adjoining tract on which he owned and operated a brickyard. It was thereafter occupied, continuously, down to the time of the commencement of the action by defendant *Eagle River Brick Company* in connection with the brickyard forty, under an agreement with the owner to convey the same to it for $200, as soon as cleared of back taxes. The plaintiffs did not know of the occupancy aforesaid till after the conveyance, hereafter mentioned, to defendant *Comstock*. Some time subsequent to the death of Mr. Kathan, under an agreement with one Colman, county

judge of Vilas county, that title to all the lands should be vested in one George in the interest of plaintiffs and the particular tract then be by him conveyed to the brick company of which Colman was a stockholder, proceedings were had, in form, in the county court of Vilas county, but in fact in the county of Shawano, resulting in such title being, in form, so vested, whereupon George conveyed the particular tract to said brick company pursuant to such agreement.

The first of the aforesaid tax deeds was made and recorded in May, 1889, and the last one in May, 1898. After the proceedings aforesaid, in form vesting the title in George, defendant *Pier* represented and caused to be represented to plaintiffs that the statute of limitations had run in favor of her tax deeds, effectually divesting the title to said lands from plaintiffs and vesting the same in her. She did that for the purpose of inducing them to convey, in form, the twenty-two tracts of land to defendant *Comstock* for the sum of $30. The particular tract then, and at the time of the commencement of this action, was worth at least $200. Relying upon such representations which were in fact false, the tax-deed titles as to such particular land having been extinguished by the statute of limitations, the same having been occupied, as aforesaid, such proceedings were taken in the circuit court for Shawano county that the title of plaintiffs in all the lands for the consideration aforesaid was vested in *Comstock*, the deed to that effect being duly recorded. That was accomplished in the interest of said *Pier* so that she might control the patent title as well as the tax title to all said lands. The next day after the conveyance to said *Comstock* said *Pier* caused the particular tract to be mortgaged to her daughter, the defendant *McIntosh*, ostensibly to secure $250, but in fact to give her standing to commence an action to quiet the title as against the brick company. Such action was commenced, and, during the proceedings therein, plaintiffs became possessed of information as to the possession

aforesaid extinguishing the tax-title claim. Thereupon this action was brought against all parties adversely interested to vacate said deeds made by plaintiffs and the mortgage as well, establish the title to said particular land in plaintiffs according to the facts, and remove all clouds existing thereon created by the deed to George, the deed by him to the brick company, the deed to *Comstock,* and the mortgage.

On such facts judgment was awarded to plaintiffs wholly annulling the deed to *Comstock,* conditioned upon the consideration paid by him as aforesaid being paid into court for his use, and decreeing that the possession by the brick company was lawful but under a license revocable at the pleasure of plaintiffs. Costs were awarded in plaintiffs' favor in one bill against *Comstock, Pier,* and *McIntosh,* and in favor of the brick company against the same parties.

C. H. Van Alstine, for the appellants.

For the respondents there was a brief by *Wallrich, Dillett & Larson,* and oral argument by *Albert L. Larson.*

Marshall, J. The findings of fact do not appear, at any point, contrary to the clear preponderance of the evidence. Therefore, by a familiar principle, they must be regarded as verities and the judgment based thereon right, if the conclusions of law are warranted.

If the particular tract of land was in the actual possession of Kathan, deceased, for the full three years after execution and recording of the last tax deed, as found by the trial court, and it seems, as above indicated, that such must be taken as the fact, the tax titles were thereby extinguished, leaving *Kate Pier* without any interest in the land whatever at the time she represented to the Kathan heirs that she had the whole title under her tax deeds for the purpose of inducing them to part with the patent title to *Comstock. Jones v. Collins,* 16 Wis. 594; *Pulford v. Whicher,* 76 Wis. 555, 45 N. W. 418.

It is the settled law, not disputed at all by appellants, that actual or constructive possession of land under a tax deed for the full period of three years is necessary for operation of the statute of limitations, and that interruption of the mere constructive possession, created by recording a tax deed of vacant and unoccupied land, by actual possession for any period by the former owner within the three years after such recording, turns the statute of limitations in favor of the former owner, which, if not interrupted by action on the part of the tax-title claimant or actual possession by him within the three years after the recording of the tax deed, extinguishes all rights under such deed. *Cornell Univ. v. Mead,* 80 Wis. 387, 49 N. W. 815; *Midlothian I. M. Co. v. Belknap,* 108 Wis. 198, 84 N. W. 169.

No question is raised but that the proceedings whereby the title to the land in question was conveyed to George and by him to the brick company were void. It is insisted, however, that the representation made by *Kate Pier* as to her tax titles having extinguished the Kathan title, was not a representation of fact but was a mere legal opinion of the effect of the tax deeds, and so was not fatal to the *Comstock* deed.

We are unable to sustain the contention that the representation was a mere opinion grounded on such pure mistake of law as equity will not relieve from. She knew, or ought to have known, that such a representation, in all reasonable probability, was false, unless the land was vacant and unoccupied at the time of the recording of her tax deeds and so continued during the entire statutory period of three years. Therefore, she knew, or ought to have known, that such representation, by necessary implication, carried the idea that such vacancy and nonoccupancy had existed. So the representation was false and was of a fact material to the transaction which it operated to bring about.

It may be that *Mrs. Pier* did not know there was occupancy of the land preventing the bar of the statute from running in

favor of her tax titles. It may be that there was no moral turpitude characterizing the transaction. Whether there was or was not is not material. In this class of cases fraud in law is just as effective as fraud in fact. If one in negotiating with another in contractual matters makes misrepresentations of fact material to the transaction for the purpose of inducing such other to act thereon and such other reasonably does so act to his prejudice, he may avoid the result on the ground of fraud, actual or constructive,—the latter really involving, generally, mere mistake of fact,—and may have the aid of equity jurisdiction to that end. It is not a sufficient answer to the claim of such other for such person to say he made the representations honestly, for it is, in law and equity, as regards avoiding such a transaction, his duty to know whereof he speaks or not to speak at all as of his knowledge. This court has many times spoken on that question. *Davis v. Nuzum,* 72 Wis. 439, 40 N. W. 497; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88; *Hart v. Moulton,* 104 Wis. 349, 359, 80 N. W. 599; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Zunker v. Kuehn,* 113 Wis. 421, 88 N. W. 605.

The statement made to the effect that it is sufficient to put the party making misrepresentations in the wrong, if he knew, or ought to have known, of their falsity, is not grounded on principles of actionable negligence, but on the idea that he who makes representations to another of material facts for the purpose of inducing that other to enter into contractual relations with him and which are liable to accomplish the purpose without want of ordinary care on the part of such other, is bound at his peril to know whereof he speaks. He ought to know, not because he should not act negligently, but because under such circumstances he should not speak to the facts at all for the purpose of inducing such other to act depending on the truthfulness of what is spoken unless he knows that his representations are true or expects to assume the

burden of warrantor of their truthfulness. *Palmer v. Goldberg,* 128 Wis. 103, 111, 107 N. W. 478.

That one may reasonably act, not knowing the facts involved himself,—but on the faith of representations by another who desires to enter into contractual relations with him,—as to conditions not presently observable, as in this case, is so elementary that we will treat it as a matter not requiring extended discussion in this opinion.

The claim is made that the court should not have set aside the entire deed to *Comstock* because of the false representations as to the particular tract of land. It may be that a showing might have been made which would have moved the court, as one of conscience, to require a partial restoration of the consideration paid by *Comstock* and on condition thereof vacate the deed to him as to the one forty only. The court at the close of the evidence fully acquitted *Mrs. Pier* of any actual intention to perpetrate a fraud upon respondents. She was found to have innocently, so far as moral turpitude is concerned, made false representations as to a material fact under such circumstances as to render the resulting transaction voidable. The court concluded a statement of his views thus: "I think there is sufficient ground for a court of equity to set aside the deed so far as it relates to this tract of land." Thereupon respondents' counsel said, addressing the court: "I am perfectly willing for you to make it optional with defendants whether the whole deed shall be set aside." Then counsel for appellants addressed the court, saying: "I prefer to take the judgment of the court." Thereafter findings were filed closing with an order for judgment as we find it.

It may be that after what occurred counsel for appellants should have offered evidence, enabling the court to apportion the consideration paid by *Comstock* so as to require restoration to him of the equitable amount which the particular tract represented. It is the opinion of the court that they should,

and that since they failed to do so, it was not error for the court to deal with the transaction as an entirety, as was done. Certainly, as the case was submitted, there was no basis for a judicial splitting up of the consideration.

In the judgment of the writer the offer of respondents' counsel should, under the circumstances, have been regarded as consenting to restore the whole consideration as a condition of relief from the deeds and mortgage as to the one forty. That is reasonable, it seems, since only the trifling sum of $30 was involved. It is the writer's judgment that General Bragg, the able counsel who represented appellants at the trial, so understood it. He is too good a lawyer to have supposed it required consent, or acceptance of an option on his part to enable the court to act upon such an offer so understood. He doubtless acted as he did, without reflection, through caution as to prejudicing the rights of his clients on appeal respecting the merits of the case, and was surprised when the order for judgment was filed providing for a vacation of the deed as to the whole twenty-two forties, when the only misrepresentation complained of was as to the one forty, and the statute of limitations had, in fact, run as to the other twenty-one forties, so that the vacation of the deed as to them could not be of any benefit to respondents. I think the trial court should have interpreted the offer of respondents' counsel as indicated and ordered judgment vacating the deed as to the one tract on return of the $30, or a less sum if respondents' counsel saw fit to make proof of the equitable amount.

The court, however, is of the opinion, as indicated, that as appellants' counsel elected to have the case submitted the trial court did not commit error; that it was warranted in not requiring restoration of the full consideration for the recovery of the one forty and in not, on its own motion, requiring proof enabling it to equitably divide the consideration so as to deal with the deed and mortgage as to the one forty by itself.

The foregoing covers all questions in the case which appear to be of sufficient moment to require special notice. All have received consideration, resulting, in the opinion of the court, that the judgment should be affirmed.

By the Court.—So ordered.

TIMLIN and BARNES, JJ., took no part.

ROACH, Appellant, vs. SANBORN LAND COMPANY, imp., Respondent.

October 6—October 26, 1909.

Law of the case: Decision on former appeal: Tax titles: Setting aside void tax deeds: Repayment by mortgagee of taxes paid by claimant after acquiring equity of redemption: Appeal: Review: Orders: Exceptions: Costs for printing.

1. The decision on a former appeal is the law of the case and, whether right or wrong, is controlling upon a second appeal in the same action.
2. Where under a mortgage or trust deed the owner of the equity of redemption is bound to pay all taxes upon the land he cannot, as against the mortgagee, ascribe such payment to his attitude as claimant under a tax title, especially where the tax title is void as a title and effective merely as a lien.
3. In an action by the holder of notes secured by a trust deed to set aside certain tax deeds of the lands it was decided on a former appeal that the tax deeds were void and that plaintiff was entitled to have them set aside on payment of the amounts for which the lands were sold and "the amounts of subsequent taxes paid by the tax-title claimant," with interest, as provided in sec. 1210*h*, Stats. (1898). Before the action was commenced defendant had acquired the fee title to the equity of redemption from the grantors in the trust deed, which deed contained the usual covenant for payment of taxes. *Held*, that taxes paid by defendant after acquiring such fee title were not "paid by the tax-title claimant" within the meaning of the former decision, and plaintiff was not bound, either by sec. 1210*h*

or by the mandate on the former appeal, to reimburse defendant therefor.

4. An order confirming and adopting a referee's report as to the amounts to be paid by the plaintiff as a condition precedent to his right to judgment setting aside tax deeds, is an order involving the merits and necessarily affecting the judgment, and therefore, under sec. 2898, Stats. (1898), is a part of the judgment roll and under sec. 3070 is reviewable on appeal from the judgment, whether excepted to or not.
5. The conclusion of law involved in such order is reviewable on appeal without exception to the findings of fact upon which it is based or settlement of a bill of exceptions containing all the evidence.
6. Costs are not allowed for printing of a case not in compliance with Supreme Court Rule 6.

Appeal from a judgment of the circuit court for Forest county: John Goodland, Circuit Judge. *Affirmed.*

This action, commenced in November, 1902, asserted plaintiff's lien by virtue of the ownership of certain notes secured by a trust deed on premises in Wisconsin, and claims against the same lands by virtue of certain tax sales and deeds held by various defendants, and sought to clear the title. The several answers set forth that all said tax rights had been conveyed to the *Sanborn Land Company,* and that it owned the lands by valid tax deeds. Upon a previous appeal it was settled by this court that plaintiff's lien upon the land was valid, that the tax deeds were void, and that plaintiff was entitled to have said deeds set aside upon payment of the amounts for which the lands were sold "as well as the amounts of subsequent taxes paid by the tax-title claimants," with interest at fifteen per cent., in compliance with sec. 1210*h*, Stats. (1898). *Roach v. Sanborn L. Co.* 135 Wis. 354, 115 N. W. 1102. After *remittitur,* the several amounts for which the lands were sold and for all taxes subsequently paid thereon up to and including those for the year 1907 were ascertained upon reference, and the amount thereof, with fifteen per cent. interest, $3,575.46, was required to be paid as a condition of judgment setting aside defendants' tax

deeds. It appeared that in November, 1902, shortly before the commencement of the suit, the defendant *Sanborn Land Company,* the holder of the tax deeds, acquired the fee title to the equity of redemption by mesne conveyances from the grantors in the trust deed, which by the way contained the usual covenants for payment of taxes. Since said time the claims under the tax deeds and the equity of redemption have been in the same party, by whom the taxes have been paid. It was found by the referee that on November 15, 1902, before suit, plaintiff had tendered to the county clerk an amount more than sufficient to redeem all of said tax liens then existing, together with interest and charges thereon. Plaintiff paid to the clerk of court under protest the said amount of taxes and interest, whereupon judgment was entered canceling the tax deeds and barring defendants from any claim under them. After judgment an order was entered to pay defendant *Sanborn Land Company* all the money so deposited upon its filing bond conditioned on repayment of any sum that may hereafter finally be determined should be returned to the plaintiff. This appeal is taken from the judgment by plaintiff.

Samuel Shaw, for the appellant.

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn.*

Dodge, J. The appellant's principal contention upon this appeal is that the defendant, who held the ostensible tax titles on the mortgaged property, having acquired the fee title, which was burdened with the duty of paying all taxes, is not entitled to receive anything as a condition of declaring plaintiff's mortgage interest free from the defendant's tax liens. That contention is, however, in contradiction of the express decision of this court upon the former appeal to the effect that, as a condition of canceling those tax deeds, plaintiff should repay the cost and taxes with fifteen per cent.

interest. That decision is the law of the case, and must control, whether right or wrong. *Cole v. Clarke,* 3 Wis. 323; *McCord v. Hill,* 117 Wis. 306, 94 N. W. 65; *State v. Wis. Cent. R. Co.* 133 Wis. 478, 113 N. W. 952; *Steele v. Korn,* 137 Wis. 51, 120 N. W. 261.

It is also claimed, however, that the order of the trial court went further than required by this mandate, for that the latter only commands that there shall be paid all "subsequent taxes *paid by the tax-title claimants,*" and that taxes paid after November, 1902, by the *Sanborn Land Company,* when it held the fee title subject to a duty to pay taxes, cannot be deemed to have been paid by it as the tax-title claimant, although it also held certain tax liens. But the order for payment includes those subsequent taxes. We see no escape from this contention of plaintiff. The law is well settled that expenditure of money for taxes by the holder of the fee title will be deemed a payment of the tax, and especially so as against a mortgagee whose mortgage requires the holder of the equity of redemption to pay all taxes. In such case the owner of the equity of redemption cannot be allowed, as against the mortgagee, to ascribe such payment to his attitude as tax-title claimant, especially where the tax title is void, as a title, and effective merely as a lien. *Smith v. Lewis,* 20 Wis. 350, 354; *Avery v. Judd,* 21 Wis. 262; *Hill v. Buffington,* 106 Wis. 525, 535, 82 N. W. 712; *Allen v. Allen,* 114 Wis. 615, 630, 91 N. W. 218. This would be the measure of the legal rights of the parties under sec. 1210*h,* Stats. (1898), and it is not to be presumed that the mandate of this court was intended to extend any further, in the absence of clear and unambiguous language. At the time of the former decision there had been no showing that any taxes had been paid subsequent to the commencement of the suit in November, 1902, or that the defendant claimed reimbursement of any such taxes, and, while the court was informed of the fact that the fee title had been acquired by the *Sanborn Land*

Company, and might have inferred that probably somebody had paid taxes between 1902 and April, 1908, when the decision in this court was rendered, yet, in the absence of assertion of any such claim, there is no necessary implication that the words of the mandate were intended to include subsequent taxes paid by the holder of the fee title. We therefore conclude that the plaintiff was not required, either by sec. 1210*h* or by the mandate on former appeal, to reimburse the defendant for any payment of taxes made after the commencement of the suit, and that the order requiring it is erroneous.

Respondent protests that any error in this regard is excluded from consideration on this appeal by failure of the plaintiff to reserve any exceptions or to settle a bill of exceptions containing all the evidence. These omissions exist, and have occasioned us much embarrassment. We think, however, that the record discloses the error, although perhaps not in its exact extent. The report of the referee, which is part of the record, expressly states that in the sum of $3,575.46, found to be due the defendant up to July 8, 1908, is included all taxes for the years 1895 to 1907, also that the total amount necessary to redeem on November 15, 1902, was only $1,486.91. The order of the court is expressly founded upon, and confirms and adopts, the report of the referee. This order is one obviously involving the merits and which necessarily affects the judgment, and therefore, by virtue of sec. 2898, Stats. (1898), is part of the judgment roll and of the record, and by virtue of sec. 3070, Stats. (1898), may be reviewed upon appeal, whether excepted to or not. The facts found are not questioned, but merely the conclusion of law, reviewable without exception. It clearly appears from the record, therefore, that the appellant was erroneously compelled to pay the amount of all taxes assessed for the years 1902 to 1907, inclusive, with fifteen per cent. interest thereon up to the 16th of December, 1908. The amount

thereof must be ascertained and refunded to appellant with six per cent. interest from the date when respondent received the same, apparently March 6, 1909. This can probably be best accomplished by a direct order, when the amount is ascertained, commanding the repayment, enforceable either under the contempt powers of the court or by authorizing suit upon the bond filed by respondent. This can probably be done without disturbing the judgment, which, after such repayment is accomplished, correctly adjudicates the rights of the parties.

The printed case on this appeal is in no sense a compliance with Supreme Court Rule 6, requiring it to contain "an abridgment of the record so far as necessary to present the questions for decision." It contains many pages of wholly irrelevant matter by no means necessary or pertinent to the questions brought up on appeal, and it fails to contain many essential parts of the record, whereby this court has been driven, at the expense of much time and labor, to a search through the manuscript record. Rule 44 prohibits the allowance of costs for such case.

By the Court.—Judgment affirmed, and cause remanded for further proceedings in accordance with this opinion. Appellant to recover costs, except for printing case.

KUNZA, by guardian *ad litem*, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

October 6—October 26, 1909.

Railroads: Injury to employee riding on engine: Relation of parties: Line of duty: Contributory and comparative negligence: Questions for jury.

1. Where, either by necessary implication or by the terms of his contract of service, a railway employee is required to travel on the trains of the company to or from the place or places of his

active duty, he is deemed to be in the service of his employer while so traveling, if he be in the proper place upon the train.

2. If such an employee knew or ought to have known that he had no right to ride on the engine, but voluntarily and without permission went there for his own purposes, he could not be considered as an employee while so riding, but as a trespasser, or at most a licensee.

3. Whether in this case the plaintiff, a pumper whose duties required him to ride back and forth daily on trains between pumping stations, and who was injured by a collision while riding on the engine, was justified in believing that he was entitled to ride on the engine if he chose to do so, is *held*, upon the evidence, to have been a question for the jury.

4. If in such case plaintiff believed and was justified in believing that he was entitled to ride on the engine while traveling between stations as his duties required, he was while so riding a servant of the railway company and "engaged in the line of his duty as such," within the meaning of subd. 2, sec. 1816, Stats. (Laws of 1907, ch. 254), even though he at times voluntarily or by request did firing for the engineer; and the jury should then determine whether he was guilty of contributory negligence in so riding instead of riding in the caboose as he might have done on the occasion in question, and, if so, whether such negligence was slighter or greater than the negligence of another employee which caused the collision.

SIEBECKER, J., dissents in part, being of the opinion that, upon the established facts, as matter of law the plaintiff had a right to ride on the engine and was not guilty of negligence in so doing.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action for personal injuries. In 1907 and 1908 the defendant maintained gasoline pumping engines at two of its stations on the Ashland division, about fifteen miles apart, viz., Monico Junction and Summit Lake, for the purpose of supplying its tanks with water. In August, 1907, the plaintiff, a young man eighteen years of age, was employed to operate the two engines. The plaintiff lived at Summit Lake, and his duty was to go to Monico Junction daily and operate that engine half a day, and to return to Summit

Lake and operate that engine half a day. He was to receive $35 a month and transportation back and forth, and the company gave him a pass reading: "Pass one pumper, pump man on Ash. Div. bet. Summit Lake and Monico Jct. and Crandon until December 31st, 1908, subject to conditions on the back." The plaintiff performed his duties as pumper continuously from the time of his hiring until March 5, 1908, and rode back and forth daily on the trains of the company, sometimes riding on passenger trains, sometimes on regular freight trains, and sometimes on extra freight trains, as occasion served. When riding on freight trains he sometimes rode in the caboose, but generally in the cab of the engine with the engineer. While so riding he frequently acted as fireman, either of his own volition or at request of the engineer. He wished to become a fireman, and hence was glad to act as such. While so riding in the engine he was frequently seen by the various conductors, but no objection was ever made to his being so carried. A rule of the company forbade any person riding in the engine save the engineer and fireman without a permit from certain officials, but the plaintiff did not know of the rule.

On the evening of March 5, 1908, the plaintiff, having completed his pumping at Monico Junction for the day, boarded the engine of defendant's south-bound freight train at that place and rode southward until a head-end collision occurred with another freight train, caused by the negligent failure of a telegraph operator at Pelican station to deliver a train order. In this collision plaintiff was caught in the gangway between the engine and the tender and so badly injured that his leg had to be amputated. At the close of the evidence the trial judge directed a verdict for the defendant on these facts, and the plaintiff appeals.

For the appellant there were briefs by *Morson & McMahon,* attorneys, and *Kreutzer, Bird, Rosenberry & Okoneski,* of counsel, and oral argument by *S. J. McMahon* and *C. B. Bird.*

William G. Wheeler, for the respondent.

The following opinion was filed October 26, 1909:

WINSLOW, C. J. The respondent's first claim in support of the judgment is that as a matter of law the plaintiff, while riding upon the engine, was a trespasser. We cannot agree with this contention. The weight of authority is to the effect that had he been riding in the caboose or a passenger car he would have been a co-employee with the train crew and the telegraph operator. His contract for transportation was a part of his contract of service, and while being transported in the cars of the company in the necessary transaction of his duty as pumper he was as much in the service of the company as when he was engaged in operating one of the pumping engines. The authorities to this effect are quite numerous and fairly unanimous. They will be found collated in the opinion of Judge LURTON in *Louisville & N. R. Co. v. Stuber,* 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696. In order to perform his duties at the two stations the plaintiff was required to make the trips back and forth each day, and was expected and really obliged to make the trips on the cars of the company. He was serving the company as fully and completely while he was riding from one station to the other in order that he might operate the pump at the latter station as he was while he was actually operating the pump. In the case of *Ewald v. C. & N. W. R. Co.* 70 Wis. 420, 36 N. W. 12, 591, this court held that an engine wiper while going to his work over a customary pathway through the company's yard was actually engaged in the service of the company, so that the trainmen who were moving a freight train in the yard were his co-employees. In the opinion in this case many of the cases relied upon in the *Stuber Case* are cited and relied upon as sustaining the position of the court, and indeed there would seem to be no doubt that they are quite analogous. In brief,

the principle is that where, either by necessary implication or by the terms of his contract of service, a railway employee is required to travel on the trains of the company to or from the place or places of his active duty, he is deemed to be in the service of his employer while so traveling, if he be in the proper place upon the train.

So the initial question here is whether the plaintiff was riding in a proper place at the time he was hurt. If he knew, or ought under the circumstances to have known, that he had no right to ride in the engine cab, but voluntarily and without permission went there for his own purposes, doubtless he could not be considered an employee while so riding, but a trespasser, or at most a licensee. It is said that a passenger who chooses to ride on the engine instead of in the passenger car or caboose loses his character as a passenger and becomes a mere licensee, even when he does it by permission of the conductor. *Files v. B. & A. R. Co.* 149 Mass. 204, 21 N. E. 311. This court, however, has not so held. The case of *Leasum v. G. B. & W. R. R.* 138 Wis. 593, 120 N. W. 510, is somewhat analogous. In that case a stock owner, entitled by contract to ride on a freight train in charge of his stock, voluntarily rode in the car with his stock instead of in the caboose, and there was evidence tending to show that he did so with the knowledge and approval of the conductor and brakeman, and it was held that it was a jury question whether, under the circumstances, he was not justified in believing himself entitled to ride in the freight car.

Employees of the company frequently are expected and compelled to ride upon engines, freight cars, foot-boards, and ladders in order to successfully perform their duties. In the present case it was quite apparent that it was not expected that the plaintiff should always wait for a passenger car or caboose to draw up by the side of his pump house before he made his trip from station to station. His prime

duty was to operate the pumps at each station daily, and in order to get from one post of duty to the other he was not expected to pick and choose his train, but take that which best served the purpose, whether it were passenger, regular freight, or extra freight; indeed, it appears that he sometimes rode in a light engine running alone.

The evidence shows, or tends to show, that the plaintiff's father, who held the same position immediately prior to the plaintiff's employment, was accustomed to ride on passenger cars, freight cabooses, or engines, as occasion served, to the knowledge of the plaintiff; that when the plaintiff went to work, at about eighteen years of age, he was given no instructions as to where he should ride; that he was not informed of any rule prohibiting employees from riding in the engine and knew nothing of such a rule; that immediately after he commenced his work he began to ride on the engines of freight trains with the consent and approval of the various engineers and with the knowledge of the conductors; that he frequently helped to fire the engine, either by request of the engineer or of his own volition; that this practice kept up continuously during his whole term of service without objection by any of defendant's officials; that it was sometimes necessary for the plaintiff, in order to ride on a freight train at all, to get on the engine, because when the caboose passed his pumphouse the train would be going too fast for him to board it; and that most of his riding back and forth was done on the engines of freight trains.

Under these circumstances we think it was a question for the jury to determine whether, considering all the facts surrounding his contract of service and his employment thereunder, the plaintiff was justified in believing that he was entitled to ride on the engine if he chose to do so. If the jury should so find, and further find that he did so believe at the time in question, we see no reason to doubt that the plaintiff, while so riding on the evening in question, was

legally in the employment of the defendant and in the line of his duty, notwithstanding the fact that he at times voluntarily or by request did firing for the engineer.

Should the jury answer these questions in the plaintiff's favor the fact would thereby be established that the plaintiff was a servant "engaged in the line of his duty as such" at the time of his injury within the meaning of subd. 2, sec. 1816, Stats. (1898), as amended by ch. 254, Laws of 1907, and the jury would then be required to determine whether the plaintiff was guilty of contributory negligence in riding in the engine as he did, instead of in the caboose as he might have done on the evening in question, and, if so, whether such negligence was slighter or greater than the negligence of the telegraph operator who failed to deliver or transmit the train order.

It is not deemed necessary to discuss at length the detail errors alleged. The foregoing discussion of the case quite clearly indicates the course which should be pursued when the retrial takes place.

By the Court.—Judgment reversed, and action remanded for a new trial.

The following opinion was filed November 30, 1909:

Siebecker, J. (*concurring as to reversal but dissenting as to question for jury*). While I concur in the reversal I must dissent from the decision requiring submission of the question of plaintiff's contributory negligence to the jury.

The court holds that the contract of employment required the plaintiff to ride back and forth between the stations and to use the facilities provided by the railway company. His predecessor had customarily ridden on the engine. The officials of the company in charge of trains or engines and having authority to compel the plaintiff to ride in some particular place on a train not only permitted but invited him to ride on the engine. Under the employment particular

trains or any specific place on the trains had not been designated for him in which to ride. It was proper for him to use a freight, passenger, extra, or whatsoever train would carry him between the stations, and under the circumstances the plaintiff practically was instructed to take the place on whatever transportation was provided by the company which would best suit his convenience. In the opinion of the court it is stated: "Employees of railway companies frequently are expected and compelled to ride upon engines, freight cars, foot-boards, and ladders in order to successfully perform their duties." In my opinion the facts of this case establish a contract between the parties which at times required the plaintiff to ride upon the engine. Under the circumstances and conditions of plaintiff's employment it results as a matter of law that the plaintiff was within his legal right in selecting the place on the engine on this trip, and in my opinion the jury should have been so instructed. This would eliminate all question of his contributory negligence as to the injury, for I take it that no claim of contributory negligence is made except that plaintiff was guilty of negligence in selecting the place on the engine for this particular trip. If the plaintiff was ordinarily or customarily lawfully riding on the engine, then he could not have been negligent in selecting it for this trip, and he was entitled to protection against the negligence attributable to the company.

These considerations lead me to the conclusion that, under the facts shown, the plaintiff could not be deemed guilty of negligence in riding on the engine, and the court should have so held. Under the evidence the question of the defendant's negligence and the amount of the plaintiff's damages were the only issues to be tried. *Lucas v. M. & St. P. R. Co.* 33 Wis. 41; *Eaton v. D., L. & W. R. Co.* 57 N. Y. 382; *Miller v. C., St. P., M. & O. R. Co.* 135 Wis. 247, 115 N. W. 794; *Leasum v. G. B. & W. R. R.* 138 Wis. 593, 120 N. W. 510; *L. R. & Ft. S. R. Co. v. Miles,* 40 Ark. 298.

STATE EX REL. NORTHWESTERN COAL RAILWAY COMPANY, Appellant, vs. WILLCUTS, City Clerk, Respondent.

October 6—October 26, 1909.

Certiorari: *Taxation: Railroads: Property devoted to public use: Common carriers.*

1. The question of the jurisdiction of a board of review to assess property for local taxation may be raised on *certiorari*.
2. Property of a railway company necessarily used in operating its road is exempt from local taxation under sec. 1215—25, Stats. (Supp. 1906), if the use to which it is applied is a public use under the articles of incorporation and charter of the company.
3. Whether the property of a railway company is devoted to a public use is not determined by the extent of the use but by the right of the public generally to use it and the fact that it is used by all who desire to do so.
4. The mere fact that a large part of the business done by a railway company is done for a coal company owned and controlled by practically the same persons, does not deprive the railway company of its character as a common carrier or render its property devoted to a private use, so long as it was in fact organized as a common carrier and serves the public in that capacity, although location and conditions limit the extent of such service.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

This is an appeal from a judgment quashing a writ of *certiorari*. The writ was issued to review an assessment of plaintiff's property in the city of Superior. The city clerk of the city of Superior made return to the writ showing the action of the board of review respecting the assessment, including the evidence taken before the board.

It appears from the record before the court on motion to quash that the assessors entered upon the assessment roll for 1908 lands and personal property used by the appellant in the operation of its railroad in the city of Superior; that the property consisted mainly of land on which the railroad was constructed, side tracks, a roundhouse for storing engines,

and a scalehouse containing railroad scales and two locomotives; that the incorporators of the plaintiff company duly incorporated for the purpose of constructing, maintaining, and operating the railroad in question for the carriage of freight and passengers, and a patent was duly issued to plaintiff under said articles of incorporation in December, 1892, authorizing plaintiff to construct, maintain, and operate a railroad for public use in the conveyance of persons and property from a point on Allouez Bay at or near the mouth of the Nemadji river in Douglas county, Wisconsin, to some point on the St. Louis river on the boundary line of the state in section 1, town 48, range 15, Douglas county, a distance of about twelve miles; the plaintiff paid into the state treasury of the state of Wisconsin the license fee required by law, and in March, 1908, a license was issued to plaintiff to operate its railroad from January 1 to December 31, 1908, according to law; that the plaintiff has been assessed by the state board of assessment during the years the state board has been in existence, and previous to that time paid a license to the state for the operation of the railroad in question; that the plaintiff has rendered reports to the railroad commission on its property since June, 1901, and made reports to the interstate commerce commission since that time; that the plaintiff has a tariff of rates prepared on the transfer of coal to connecting lines, which rate is posted as requested by the interstate commerce commission and the railroad commission; that the property of the plaintiff is shown on the statement issued by the state board of taxation, showing valuation placed upon railroads in the state for the year 1908, and is the same property in question; that this property was acquired by plaintiff soon after its organization, partly by purchase and partly by condemnation.

It further appears that originally the road extended to the St. Louis river, and in 1899 a part of the road was sold to the Great Northern Railway Company; that the road now

owned by the plaintiff is used for the transportation of freight principally; that it accepts any business that is offered and connects with the Great Northern, Duluth, South Shore & Atlantic, Omaha, and Northern Pacific Railway Companies; that its manner of handling freight is similar to that of other terminal companies, ninety to ninety-five per cent. or more of which business is the transportation of coal; that the northern terminus of the road is the coal dock, the other connecting with other lines of railroad in the city of Superior; that the company has about eight miles of track, including switch tracks, the main line being a trifle less than three miles; that plaintiff owns the coal dock which is operated by the Pittsburgh Coal Company of Wisconsin; that the principal business of plaintiff is securing empty cars, taking them to the dock, and returning them loaded with coal to the connecting railroads; that the coal is received at the dock from boats, but all coal received at the dock is not received by the Pittsburgh Coal Company; that the dock at various times has handled coal for other parties than the Pittsburgh Coal Company, but the bulk of the coal is received by said company; that plaintiff handled about 5,000 tons which was not purchased from nor sold by the Pittsburgh Coal Company; that plaintiff's tariff rate covered nothing but coal; that it had no depot and no cars of any kind, but had an office building; that plaintiff is a separate corporation from the Pittsburgh Coal Company, but the ownership of the stock is practically the same; that the connecting lines of railroad paid plaintiff's charge for switching coal and its side tracks were used for storing loaded and empty cars; that plaintiff's road would accept any freight or passengers or anything else—any kind of cars that is presented for transportation—and has handled passenger cars.

The property used in operating plaintiff road having been assessed by the city of Superior for local taxation by the board of review, this proceeding was brought to vacate and set aside the assessment.

For the appellant there was a brief by *Grace & Hudnall,* and oral argument by *G. B. Hudnall.*

Thos. E. Lyons, for the respondent.

KERWIN, J. The sole question upon this appeal is, Was the property of the plaintiff taxable by the city of Superior? This question turns on whether the property is exempt from taxation under the statute because of its being used for railroad purposes. It is the contention of respondent that the railroad of plaintiff is not operated for public use and is not a common carrier; therefore its property is subject to local taxation. The plaintiff was organized under ch. 87 of the statutes of this state for public purposes—for the carriage of freight and passengers. No question is made upon this point, but it is insisted that it is operating its railroad for a private and not a public purpose; therefore its property so used is subject to local taxation. It may be conceded, as insisted by respondent, that *certiorari* reaches only jurisdictional errors; therefore, unless the property put upon the assessment roll was not subject to taxation, the judgment below was right. The facts as they appear from the record are undisputed; therefore the question is sharply raised whether the board of review was acting without jurisdiction in assessing the property of the appellant, and this question may be raised by *certiorari* proceedings. *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048.

Prior to the present railway tax law, "the tracks, right of way, depot grounds, buildings, machine shops, rolling stock, and all other property necessarily used in operating any railroad in this state belonging to any railroad company" have been exempt from local taxation. Subd. 14, sec. 1038, Stats. (1898). Sec. 1215—25, Stats. (Supp. 1906), provides that "the tax and license fees imposed by this act shall be in lieu of all other taxes on the property of such railroad companies, necessarily used in the operation of said railroads in

this state." So, under the law in relation to the subject under consideration, the question is whether the property is necessarily used for a public or *quasi*-public purpose in order to enable the plaintiff to perform its duty as a common carrier, and whether it was in 1908 used for such purpose. *Duluth, S. S. & A. R. Co. v. Douglas Co.* 103 Wis. 75, 79 N. W. 34; *Chicago, St. P., M. & O. R. Co. v. Douglas Co.* 122 Wis. 273, 99 N. W. 1030; *Merrill R. & L. Co. v. Merrill,* 119 Wis. 249, 96 N. W. 686. The property owned by the plaintiff and attempted to be taxed by the city of Superior was necessary to enable the plaintiff to carry out its franchise obligations, and was therefore not subject to taxation if the use to which it was applied was a public use under the articles of incorporation and charter of plaintiff. *Chicago & N. W. R. Co. v. Forest Co.* 95 Wis. 80, 70 N. W. 77; *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, 62 N. W. 417; *Washburn v. Washburn W. Co.* 120 Wis. 575, 98 N. W. 539; *In re Milwaukee S. R. Co.* 124 Wis. 490, 102 N. W. 401. It is without dispute that plaintiff was regularly organized under ch. 87 for a public purpose, namely, to carry freight and passengers, and a charter granted from the state for such purpose, and annually from the time of its organization received a license from the state to operate its road and paid the license fees. But the argument is that it was doing a private business. This argument is based upon the ground that its principal business is not a general railroad business for the carriage of freight and passengers, but is a private business. Several cases are cited by respondents, but we shall refer to those only in this court. and think it will be seen that they are not controlling in the case now before us.

In *Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co.* 107 Wis. 192, 83 N. W. 294, the corporation was organized to carry persons only, not passengers and freight, and it was held that the statute does not authorize organizations to carry

passengers only; hence the articles did not show that the corporation was a common carrier. *Maginnis v. Knickerbocker I. Co.* 112 Wis. 385, 88 N. W. 300, is a case where the railroad company was organized as a purely private enterprise; therefore did not have the power of eminent domain. To the same effect are *McKivergan v. Alexander & E. L. Co.* 124 Wis. 60, 102 N. W. 332, and *Wallman v. R. Connor Co.* 115 Wis. 617, 92 N. W. 374. And in *Wisconsin W. Co. v. Winans,* 85 Wis. 26, 54 N. W. 1003, the question was whether the company had the power to condemn land under its charter, and it was held that the right turned upon whether the property sought to be taken was necessary for public use.

Under the rule laid down in these cases it is said that the use to which the plaintiff's property is put is not a public use, because its principal business is carrying coal of the Pittsburgh Coal Company from the dock owned by plaintiff and operated by the coal company, and that plaintiff has no station or depot, and that one end of its line terminates at its coal dock and the other where it connects with the Northern Pacific, Omaha, Duluth, South Shore & Atlantic, and Great Northern railway tracks, and that it has no facilities for handling passengers, and is so situated that it receives practically no freight to handle except coal from its own dock operated by the Pittsburgh Coal Company, the stock of which latter company is owned by the same parties who own and control the plaintiff company. The mere fact, however, that a large part of the business of plaintiff was done for the Pittsburgh Coal Company in which it is interested did not deprive plaintiff of its character of common carrier or render its property devoted to a private use so long as it was in fact organized as a common carrier and serving the public in that capacity, although to a limited extent because of location and conditions which limited such service. *Kansas & T. C. R. v. Northwestern C. & M. Co.* 161 Mo. 288, 61 S. W. 685;

Riley v. Charleston U. S. Co. 71 S. C. 457, 51 S. E. 485. Whether the property of plaintiff is devoted to a public use is not determined by the extent of the use, but by the right of the public generally to use it, and the fact that it is used for public purposes by all who desire to use it.

Upon the admitted facts as they appear from the record we see no escape from the conclusion that the plaintiff was a common carrier and its property devoted to a public use, and, though limited in the extent of such business, it was doing the business of a common carrier. Its road and switch tracks were subject to use by all the public. The road carried for the public generally between its termini, the coal dock and several other railroads. It did not have the usual accommodations for carrying passengers because of location and conditions, and because of such location and conditions there were no passengers to carry. But it held itself out ready and willing to carry all passengers, and would accept any passengers or any kind of cars presented for transportation over its line without discrimination. It is true the business was largely freight and largely the freight of the Pittsburgh Coal Company, but it is also true that between the termini of its road the plaintiff served all people alike without discrimination and in compliance with law applicable to common carriers, and it was therefore at least doing the business of a common carrier, and ready and willing to do all business presented in the locality it operated. It therefore stood on the same basis as any other common carrier organized under the statute respecting the taxation of its property. *Chicago & N. W. R. Co. v. Morehouse,* 112 Wis. 1, 87 N. W. 849; *Butte, A. & P. R. Co. v. Montana U. R. Co.* 16 Mont. 504, 41 Pac. 232; *Chicago, B. & N. R. Co. v. Porter,* 43 Minn. 527, 46 N. W. 75; *State ex rel. Duluth B. L. R. Co. v. District Court,* 54 Minn. 34, 55 N. W. 816; *Bridal Veil L. Co. v. Johnson,* 30 Oreg. 205, 46 Pac. 790; *Kansas & T. C. R. v. Northwestern C. & M. Co.* 161 Mo. 288, 61 S. W. 685; *Chicago, St. P., M. & O. R. Co. v. Douglas Co.* 122 Wis. 273, 99

N. W. 1030; *Duluth, S. S. & A. R. Co. v. Douglas Co.* 103 Wis. 75, 79 N. W. 34.

We are convinced upon prineiple and authority that the plaintiff is a common carrier, and that the property in question used in operating its road was not subject to taxation by the city of Superior; therefore the judgment quashing the writ of *certiorari* must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

FOSNES, Appellant, vs. DULUTH STREET RAILWAY COMPANY, Respondent.

October 6—October 26, 1909.

Street railways: Injury to passenger alighting from moving car: Contributory negligence: Presumption as to intelligence.

1. Although a man had recently come to this country and did not speak English it will be presumed that he was a man of ordinary intelligence.
2. It was, as matter of law, negligence for a man of full age and ordinary intelligence, confronted with no exigency and laboring under no fright or excitement, to attempt to alight from a street car which to his knowledge was moving at the rate of six miles an hour, although the conductor had negligently failed to stop the car as requested and the passenger—who had recently come to this country, and was unable to speak English, and was inexperienced in street railway travel—had at other times seen passengers alight from moving cars, and concluded that he was required to do so, and supposed it was perfectly safe.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Victor Linley,* and for the respondent on that of *Frank A. Ross.*

Timlin, J. In this case an objection to the reception of any evidence under the complaint was sustained upon the ground that no cause of action was stated therein. The plaintiff did not ask leave to amend, and judgment was granted dismissing the complaint. No error is assigned for failure to grant leave to amend.

It appeared by the complaint that the plaintiff, a passenger upon a street railway car, requested the conductor to let him off at a designated street, and the conductor knew the wish of the passenger to get off at that street, but carelessly, negligently, and wantonly failed and neglected to stop the car at that street without explanation to the passenger, and the passenger then attempted to get off the car at this street while the car was moving at the rate of six miles an hour, and in so doing was accidentally thrown to the ground and injured. This presents a case of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. Six miles per hour must be considered a considerable speed, and indeed a high rate of speed, for the purpose of alighting from a moving street car. The ordinary inference of contributory negligence from such attempt recognized in *Champane v. La Crosse C. R. Co.* 121 Wis. 554, 99 N. W. 334, and *Hardy v. Milwaukee St. R. Co.* 89 Wis. 183, 61 N. W. 771, is apparently sought to be overcome by the pleader by the following additional averments in the complaint: The passenger recently arrived in the United States from Norway, did not speak the English language, was inexperienced in street railway travel, and had seen other passengers at other previous times alight from the cars of the defendant while such cars were in motion at street crossings; and concluded that he was required to get off the car while it was in motion, and supposed it was perfectly safe for him to get off the car, although it was moving at the rate of six miles an hour.

Assuming in support of the complaint that the conductor understood the language of plaintiff, that plaintiff knew he was approaching his intended place of alighting, that this was

a proper and usual place at which to stop the car, and that the "other previous times" when he had seen passengers alighting while the cars were in motion were sufficiently recent and sufficiently numerous to induce him to believe this was the American way, but not sufficiently numerous to remove his inexperience in street railway travel, still we must assume that there was no urgency beyond the risk of his being carried a square or thereabouts past his destination. Notwithstanding he did not possess the felicity of having lived long in this country, or of speaking the English language, he must be considered a man of ordinary intelligence. *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832. While it cannot be said as matter of law that in all cases alighting from a moving street car constitutes contributory negligence, yet this may justly be said in a case where the party alighting is a man of full age and ordinary intelligence laboring under no fright or excitement, confronted with no exigency, and the car is to his knowledge moving at the rate of six miles an hour. It follows that the judgment of the superior court should be affirmed.

By the Court.—The judgment of the superior court is affirmed.

MONAGHAN, Respondent, vs. NORTHWESTERN FUEL COMPANY, Appellant.

October 6—October 26, 1909.

Appeal: Exceptions: Instructions to jury: Master and servant: Injuries from unguarded machinery: Proximate cause: Contributory negligence: Evidence: Competency: Opinions of experts: Improper remarks by counsel: Questions for jury: Excessive damages.

1. Rulings refusing requested instructions will not be reviewed on appeal in the absence of exceptions thereto.
2. The jury were instructed that in answering, in the special verdict, a question as to whether the machinery in which plaintiff

was injured was so located as to be dangerous to employees in the discharge of their duties, they should consider "among other things" the location of the machinery with reference to where it became reasonably necessary for employees to be situated in the discharge of their duties in and about it, and its situation and surroundings as shown by the evidence. *Held*, that presumably the jury understood that the "other things" were limited to things shown by the evidence, and in the absence of any request for an instruction to that effect there was no prejudicial error.

3. In the absence of a request therefor, omission to give any instructions relative to a question submitted for special verdict is not error.

4. It is not error to give to the jury *verbatim* the definition of proximate cause found in *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 288, approved in *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 431.

5. Upon the issue of contributory negligence of a servant who was injured while oiling machinery, evidence as to how other servants had done the same work was competent to show that he was doing it in the usual and ordinary way.

6. The opinion of a physician as to the physical condition of plaintiff, the necessity of an operation, and its effect, based on plaintiff's testimony as to his condition and upon an examination made by the witness after the injury, was competent, its weight being for the jury.

7. A model produced by plaintiff having been excluded because incorrect, remarks of plaintiff's counsel in his argument to the jury to the effect that defendant produced no model because it would be less favorable to it than that produced by plaintiff, are *held* not ground for reversal, in view of an instruction to the jury that no inference adverse to defendant should be drawn from the argument of plaintiff's counsel, except in so far as that argument was based on testimony.

8. What may be a proper and sufficient barrier or guard with reference to servants having no duty to perform about dangerous machinery is not necessarily so for one who, in oiling such machinery, is obliged to lean over the barrier and bring his hands and other parts of his body in close proximity to rapidly revolving gearings. Such a servant is entitled to have those gearings securely guarded or fenced for his safety, if practicable without seriously impairing the efficiency and use of the machinery.

9. Sec. 1636*jj*, Stats. (Supp. 1906; Laws of 1905, ch. 303), providing that, in an action by a servant for personal injuries caused by

negligent omission of the master to securely guard dangerous machinery, the fact that the servant continued in the employment with knowledge of such omission shall not operate as a defense, has eliminated assumption of risk from the defense of contributory negligence in such cases.

10. A man forty-three years old, earning $2.75 per day, sustained injuries necessitating amputation of his left arm close to the shoulder; his nose was broken and his face disfigured; three ribs were fractured, and his side badly lacerated and perhaps permanently injured. *Held*, that a verdict awarding $14,500 damages, upheld by the trial court, should not be disturbed on appeal. BARNES, MARSHALL, and DODGE, JJ., dissent.

11. MARSHALL, J., is of the opinion that under sec. 2878, Stats. (1898), where damages awarded are so excessive as to show passion or prejudice on the part of the jury the verdict may be set aside as being "contrary to the evidence;" and that it may be set aside "for excessive or inadequate damages" although there was no passion, prejudice, or improper motive.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to recover damages for a personal injury. Plaintiff was employed by defendant on its coal dock. Coal was elevated and screened at such dock, and the necessary power was furnished by electric motors. Plaintiff had been in charge of one of such motors for about eleven months before the injury. The motor was stopped and started by plaintiff on signal, and it was his duty to oil the machinery connected therewith and keep it in running order. Power was delivered from said motor through a number of cogwheels in close proximity thereto. The motor stood about two feet above the platform leading to it. The machinery and motor appear to have been practically unapproachable on three sides. They could be approached by a platform on the fourth side, which platform was used by the operator in oiling the machinery. The gearings were in line with the platform. There was a railing, made of scantling, nearly three feet in height near the end of the platform and in close proximity to the motor. There were boxes in the bearings for the purpose of oiling

them. The gearing in which plaintiff was hurt was in the neighborhood of three feet from the top of the railing in a downward and westerly direction from such railing. It was necessary for plaintiff in oiling the bearings in question to lean over the railing, and, owing to the prevalence of coal dust, it appeared to be necessary for the oiler at times to bend over some distance so as to bring his eyes in close proximity to the oil cups to enable him to see them. While plaintiff was leaning over such railing his sleeve was caught in one of the gearings and he was dragged over the railing and into the machinery and badly injured. The alleged negligence of the defendant consisted in its failure to cover the gearings in which plaintiff was hurt.

The jury found (1) that the machinery in which plaintiff was injured was so located as to be dangerous to employees in the discharge of their duties; (2) that the defendant failed to have the machinery securely guarded or fenced; (3) that the failure to securely guard or fence was the proximate cause of plaintiff's injury; (4) that the plaintiff was not guilty of any want of ordinary care which contributed to produce his injury; (5) that the plaintiff sustained damages to the amount of $14,500 by reason of his injury. On such verdict judgment was rendered in favor of plaintiff.

For the appellant there was a brief by *P. J. McLaughlin, A. E. Boyesen,* and *Solon L. Perrin,* and oral argument by *Mr. McLaughlin* and *Mr. Perrin.*

W. P. Crawford, for the respondent.

Barnes, J. The appellant assigns as error: (1) The refusal of the court to give certain instructions which were requested; (2) the charge of the court under the first question in the special verdict; (3) failure of the court to give any charge in relation to the second question in the special verdict; (4) giving an erroneous definition of proximate cause; (5) receiving incompetent testimony prejudicial to the de-

fendant; (6) prejudicial and improper remarks made to the jury by plaintiff's counsel; (7) refusal of the court to direct a verdict in defendant's favor, (a) because the gearing upon which plaintiff was injured was sufficiently guarded or fenced, and (b) because the plaintiff was guilty of contributory negligence; (8) refusal to set aside the verdict because the damages assessed were excessive.

1. No exception was taken to the refusal of the court to give the instructions requested, hence the rulings of the trial judge in this regard cannot be considered in this court.

2. By the first question in the special verdict the jury was asked: "Was the machinery in which plaintiff was injured so located as to be dangerous to employees in the discharge of their duties?" The court charged the jury:

"In answering this question you will consider, *among other things,* the location of the machinery in question with reference to where it became reasonably necessary for employees to be situated or placed in the discharge of their duties in and about it, and its situation and surroundings as shown by the evidence."

The criticism upon the charge is the use of the words "among other things;" it being urged that the instruction permitted the jury to consider matters outside of the evidence. In answering the question there were a number of things that the jury might very properly have considered aside from the specific ones mentioned by the court, as, for instance, the height of the railing, its proximity to the gearing, and the extent to which the vision was obscured by coal dust, as well as other items of evidence. Presumably the jury understood that the "other things" they might consider should be restricted to such things as were shown by the evidence. In the absence of a request to charge that extraneous matters should be excluded from consideration, we do not think any prejudicial error was committed, if it be conceded that the language used was not as guarded as it might have been.

3. No request was made upon the court to give any charge

in relation to the second question in the special verdict. In the absence of such request no error resulted. *Newton v. Whitney,* 77 Wis. 515, 46 N. W. 882. Moreover, we do not find any exception in the record to raise this question.

4. The definition of "proximate cause" given by the court was taken *verbatim* from *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 288, 72 N. W. 735, which definition is approved in *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 423, 431, 99 N. W. 1034, and in other cases, and it is undoubtedly one that is very generally given by trial courts. It is probable that counsel could improve on this definition, but it has been so often laid down for the guidance of trial courts, and they have been so frequently admonished to follow it, that it would hardly be consistent to hold that error resulted from so doing.

5. It is urged that the court erred in receiving testimony tending to show how other servants of the defendant oiled the machine prior to the plaintiff's employment, where they stood when oiling it, the condition of the light at the time of the injury, and the fact that the gearings were uncovered. It was competent for the plaintiff to show on the issue of contributory negligence any pertinent facts tending to establish ordinary care on his part. The fact that he oiled the machinery in the usual, customary, and ordinary way could best be established by showing how others had done the same work, and we think the testimony was not incompetent.

Dr. Sarazin was permitted to testify under objection that, assuming the statement of the plaintiff to be true as to his condition, he thought there was dead bone in the ribs, and that an operation to remove the same would be necessary, and that such removal would weaken the side. It is urged that the doctor had made no sufficient examination and had no sufficient information concerning the plaintiff's condition to qualify him to give the testimony complained of. The evidence was based on the statement made by the plaintiff on the

witness stand as to his condition, and upon an examination made by the witness after the injury. The evidence was competent, even though it might not have been convincing. The weight to be accorded to it was for the jury to pass upon.

6. The plaintiff produced a model on the trial which the court refused to receive in evidence because it was not correct. In his argument to the jury plaintiff's counsel stated in substance that the reason why defendant did not produce a model was that if one had been produced it would have been more unfavorable to it than that made by plaintiff. Exception was taken to such remarks. The court charged the jury: "No inference adverse to the defendant should be drawn from the argument of plaintiff's counsel, except in so far as that argument is based on testimony." In view of this instruction and of the nature of the remarks and the probable cause of their being made, no error resulted.

7. It is argued with much force that this court should say as a matter of law that the machinery in question was sufficiently fenced or guarded, and that therefore no negligence or breach of statutory duty was shown on the part of the defendant, and also that plaintiff was guilty of contributory negligence. These are the principal contentions relied on for a reversal of the judgment. Had the injury happened to some employee who had no duty to perform about the machinery in question, the argument that plaintiff had complied with its statutory duty to sufficiently fence or guard this machinery would be convincing. The barrier was nearly three feet high and was substantial. But what might be a proper and sufficient safeguard for the ordinary employee might not be so for the plaintiff, who in the performance of his duties was obliged to lean over the barrier and bring his hands and other parts of his body in close proximity to rapidly revolving gearings. The plaintiff was as much entitled to have these gearings securely guarded or fenced for his safety as were other employees. Manifestly, a covering over the gearings in his case

would perform a function which a mere fence or barrier would not. There was no attempt to show that it was impracticable to cover such gearings without seriously impairing the efficiency and use of the machinery, and we think the question of defendant's failure to sufficiently fence or guard the gearings in question, under the facts of this case, was fairly one for the jury to pass upon.

If we eliminate from the defense of contributory negligence the fact that plaintiff continued in his employment a period of eleven months knowing its dangerous character, there is nothing to be found in the evidence that would warrant a court in holding as a matter of law that plaintiff could not recover because he was shown to be guilty of contributory negligence. Sec. 1636*jj*, Stats. (Supp. 1906; Laws of 1905, ch. 303), provides that the fact that an employee remains in an employment with knowledge that the employer has not sufficiently guarded or fenced dangerous machinery shall not operate as a defense to such an action as is here brought. This statute has eliminated assumption of hazard from the defense of contributory negligence in the class of cases to which it is applicable. *Klotz v. Power & M. M. Co.* 136 Wis. 107, 109, 116 N. W. 770; *Lind v. Uniform S. & P. Co., ante,* p. 183, 120 N. W. 839. We perceive no error in submitting to the jury for consideration the question of negligence on the part of the defendant and want of ordinary care on the part of the plaintiff.

8. The plaintiff was forty-three years old at the time of his injury and was earning $2.75 per day. Such injury necessitated the amputation of his left arm close to the shoulder. His nose was broken and the injuries to his face have resulted in disfigurement. Three of his ribs were fractured and his side was badly lacerated and had not entirely healed at the time of the trial. There was some testimony given tending to show that the injury to the side is permanent, although such evidence is of an unsatisfactory character.

The appellant urges that the damages awarded as compensation for the injuries detailed are excessive and should be reduced. In view of the deference that should be paid to the finding of a jury on this as well as on other questions of fact, and because the trial court who heard the testimony refused to say that the verdict was excessive, this court does not feel warranted in disturbing it. The writer does not concur in this conclusion, and thinks that the plaintiff should be required to remit a substantial sum from the judgment or to submit to a new trial. This view is concurred in by Justices MARSHALL and DODGE.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting in part*). As indicated in the court's opinion I concur with the writer thereof and Mr. Justice DODGE that the verdict is excessive. I apprehend that if we were permitted to appraise the damages as an original matter they would not reach near the jury's figure. The idea prevails that this court should not, in any case, reverse the trial determination on such a question unless the verdict appears so out of all reason, as to indicate, clearly, that there was passion or prejudice or perversity of some sort in reaching the result.

If I were to treat the subject here according to the stated prevailing view, and it must be conceded there is support for such view in the decisions of this court, I would say the recovery is so large as to leave the suggested fatal characteristic clearly inferable.

How are we to determine that the jury in such a case were actuated by passion or prejudice? Manifestly, not, necessarily, by seeking to discover whether they acted honestly. *Godfrey v. Godfrey,* 127 Wis. 47, 106 N. W. 814. A person may be moved by passion or prejudice to do or not to do a particular thing and yet be free from the slightest taint of moral or legal turpitude. We cannot determine whether a

jury were actuated by passion or prejudice by considering what amount of money a person would take as a fair equivalent for an arm, other disablements, pain caused thereby and impaired ability to work, and the future loss in that regard he will be reasonably certain to suffer,—in case he were given opportunity to make such exchange by treaty. We cannot determine the matter by the ability of the wrongdoer to respond in damages. The theory of the law is compensation. The damages would not be greater if caused by inadvertence of an individual of means so small that the amount for a single accident would be destruction, in that it would cast the defendant into bankruptcy, than if caused by one of great wealth. The subject has a deep practical common sense side. Every industrial accident whether caused by negligence of employer or employee or of both, or without the inadvertence of any one, involves a sacrifice upon industry's altar which must, inevitably, in the end, be cast upon the consumers of the products of industry. Pity 'tis that these inevitable sacrifices fall first upon the weakest members of society; those who work and must work within the zone of danger, and do not reach the final resting place by absorption into the general cost of living of the whole mass who are directly or indirectly served by the industry from which, from time to time, such distressing incidents must spring, without the waste and injustice of the present system, which repairs to some extent primary losses in a part only of the instances, leaving the others without any remedy at all.

Under our defective and lamentably imperfect system in assessing damages the question, in reality, is not what is a full equivalent for the injuries in the general sense, *i. e.* what would one take in money to repair the injuries, but what is a reasonable reparation under all the circumstances. How much for the mere inadvertence causing the loss, considering all interested, the employer who required the service in order to carry on his business, the employee who needed the em-

ployment, and the great consuming public which needed the combined service of employer and employee, should the latter have as an equivalent for those elements of loss which are not measured by any standard of comparison? That presents a practical question to be solved by sound judgment.

There is no market value for pain and suffering and parts of the human body. What sum of money would one take in exchange for an arm or a leg or an eye? Who can say with any degree of certainty what such things are worth? Who can say with that degree of certainty ordinarily necessary for a verdict? No sum of money can be named as the full equivalent for the severe mutilation of one's body. The whole idea of a full money equivalent contemplates an impossibility. All courts really recognize that in their declared helplessness to deal with destructive verdicts. The real idea, after all, is that he who, by breach of duty involving actionable inadvertence, injures another in his person should, as a penalty so to speak, make good to such other reasonably his loss. The fault in such a case is not criminal. If it were even of that high degree the law would not, as a rule, punish destructively. Mere inadvertence causing personal injuries are misfortunes attributable to human infirmity; never to human intention.

The foregoing suggests, as before stated, that the assessment of damages in a case of this sort presents a practical question to be solved by sound judgment not necessarily involving an exchange of equivalents on a money basis.

Does it not seem that tested by such judgment an injury, which, though severe, is so repaired by nature as to leave the afflicted one sound in mind and body to a large degree and capable of engaging in gainful occupations, should not be compensated to an extent which will yield him more than his previous customary income for life and leave at the end a fortune far in excess of what the average of his class ordinarily accumulates during a life of industry? Such an

award by the jury, it seems, evidences passion or prejudice, assuming, as we must, that they had a proper conception of the basis for measuring such losses.

We may well claim that the numerous laws, world wide, for repairing personal industrial injuries, accurately portrays the highest wisdom of our time in the light of generations of study and experience. By no one of such laws are such accidents regarded as justly entitling the injured one to compensation on the basis embodied in the verdict here. All are grounded on the idea of what an industry should reasonably contribute, under all the circumstances, to repair such unintentional injuries, the full money equivalent being regarded as impossible of ascertainment and impracticable of being rendered.

There is another side which I take this opportunity of discussing. The practice of setting aside verdicts and granting new trials to prevent a miscarriage of justice is a development from the judicial experience of ages. By the early common law it is probable there was no such practice. In time courts came to grant new trials whenever it appeared, clearly, that otherwise injustice would be done. Later the practice came to be governed by pretty well defined rules. One of them was that a verdict assessing damages in a case of this sort would not be set aside as excessive unless it appeared that the jury were actuated by passion or prejudice. It was common to raise the question on a motion to set aside the verdict as contrary to the evidence. In many jurisdictions that particular ground for a new trial has been carried into the Code by a provision for a new trial in case of "excessive damages appearing to have been given under the influence of passion and prejudice." That phrasing is found in most Codes. 14 Ency. Pl. & Pr. 759. Ours is one of the exceptions.

In some jurisdictions the particular ground for a new trial above mentioned is held to be included in the one that the

verdict is "contrary to the evidence." Our sec. 2878, Stats. (1898), has such ground, and, as before indicated, no such ground as excessiveness of damages under the influence of passion or prejudice. Since such precise common-law ground falling under the general scope as stated was not taken out of it and made one by itself, as is commonly done, it seems our Code-makers intended the scope of the general common-law ground as incorporated into the statute (sec. 2878) should remain as before.

That a motion to set aside a verdict as contrary to the evidence is broad enough under the Code to include improper assessments of damages through passion or prejudice or other perversity was early held in *Emmons v. Sheldon,* 26 Wis. 648. The court dealt with an inadequate verdict evincing passion or prejudice. It was held, on the ground of inadequacy evincing ignorance or perversity, to be contrary to the evidence. Our Code did not at first provide for granting a new trial for inadequacy of the verdict. The case cited was followed in *Robinson v. Waupaca,* 77 Wis. 544, 546, 46 N. W. 809, and *Whitney v. Milwaukee,* 65 Wis. 409, 27 N. W. 39.

I am not unmindful that this court has said a verdict cannot be successfully challenged on appeal for excessiveness in the absence of a motion in the trial court on that precise ground. *Sloteman v. Thomas & W. Mfg. Co.* 69 Wis. 499, 34 N. W. 225; *Collins v. Janesville,* 99 Wis. 464, 75 N. W. 88; *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114; *Duffy v. Radke,* 138 Wis. 38, 119 N. W. 811. But in such instances a distinction was not drawn between mere excessiveness and excessiveness through passion or prejudice. The former, it seems, is within the special statutory ground of fatal excessiveness, if not all such ground contemplates. I am inclined to the belief that it is the latter; that the Code-makers used the term "contrary to the evidence" in the same sense it had formerly been used, *i. e.* as including excessive-

ness through passion or prejudice or perversity of some sort, and to add a new ground covering cases of mere excessiveness, and so the words "through passion or prejudice," or similar words found in most Codes, were omitted from ours.

The idea early advanced by this court, as stated, that a motion to set aside a verdict on the ground of its being contrary to the evidence covers the defect of being characterized by passion or prejudice is found in the decisions of many states, as indicated in 14 Ency. Pl. & Pr. 766, note 1. Many of such authorities deal with inadequate verdicts, but it is hardly logical to say a verdict characterized by passion or prejudice is contrary to the evidence where it is too small and not where it is too large.

I am constrained to believe the practice has fallen somewhat into confusion by failure to distinguish between a perverse verdict, relievable from at common law, and under the statute by motion to set aside as contrary to the evidence, and a merely excessive verdict, made by the Code a separate and independent ground for a new trial, one unknown at common law.

While there are decisions of this court to the effect that to warrant granting a new trial because the verdict is too large it must satisfactorily appear that it is the product of passion or prejudice, there are others where relief was granted, passion or prejudice not being suggested, and still others where the verdict was very materially reduced as excessive and the jury at the same time were expressly acquitted of any fault other than mere error of judgment. Such was *Baker v. Madison,* 62 Wis. 137, 22 N. W. 141, 583. A verdict for $6,000 was condemned as excessive, the plaintiff being permitted at his option to take judgment for $3,500. It was contended that the court could not reverse for excessiveness, unless the damages seemed "flagrantly outrageous," so excessive as to lead to the conclusion that the jury were actuated by "passion or prejudice." Ancient common-law cases and

decisions from other jurisdictions, with some cases decided by this court not dealing with the Code on the question, were relied on. Relief was granted notwithstanding, as said in the opinion of the court, that the verdict was "not so large as to cause the inference that the jury were controlled or influenced by passion, prejudice, or bias, or any improper motive."

In *Murray v. Buell,* 74 Wis. 14, 17, 41 N. W. 1010, the impression is given that the element of passion or prejudice may be absent and the verdict yet be set aside as excessive. In somewhat contradictory language the court made the suggestion, but said it was unnecessary to pass upon the matter.

In *Heddles v. C. & N. W. R. Co.* 74 Wis. 239, 259, 42 N. W. 237, the verdict was set aside because of mere misconception of duty, misdirection of the court, passion, or prejudice, again suggesting that mere want of reasonable judgment is sufficient.

The field I have discussed is very broad and very important to the administration of justice. It would require a very lengthy opinion to review all cases in this court and those elsewhere under Codes similar to ours, and demonstrate that our Code provision for a new trial for excessiveness of the verdict includes want of judgment on the part of the jury, and excludes excessiveness because of passion or prejudice or perversity of any kind, that falling under the general head of contrary to the evidence. That was so held in *Beavers v. Mo. Pac. R. Co.* 47 Neb. 761, 66 N. W. 821, under a similar statute. It is otherwise held in California because the Code there contains a ground for a new trial, as follows: "Excessive damages appearing to have been given under the influence of passion or prejudice." It is also so held in Minnesota, but the Code provision there is as follows: "Excessive or insufficient damages appearing to have been given under the influence of passion or prejudice." Note that the language here is "for excessive or inadequate damages."

True, in many jurisdictions a similar Code provision is held not to cover cases where there is no rule for estimating damages, so that the recoverable amount must rest rather in mere judgment than calculation. But in such jurisdictions it is held, in general, that excessiveness through passion or prejudice falls under the classification of "contrary to the evidence," while, as we have seen by *Baker v. Madison, supra,* and others of our cases, verdicts here have been disturbed on the ground of mere excessiveness in instances of this sort and of inadequacy, as well, produced by passion, prejudice, or some other improper motive, under the special ground quoted.

Does it not appear quite plain that our Code-makers did not contemplate cases of improper verdicts relievable from under the general head of "contrary to the evidence" in adding the particular ground: "For excessive or inadequate damages," and that, misled by the common-law rules that a verdict should not be set aside for excessiveness unless characterized by passion or prejudice, and decisions elsewhere under a specific Code provision on the subject, the effort of our lawmakers to enlarge the grounds for relief from unjust recoveries has not been realized.

Viewing the case as indicated, that it is competent to deal with the verdict upon the ground of its being excessive regardless of passion or prejudice or perversity or any improper motive; merely because it is clearly too much: more than in reason can be justified, I cannot escape the conclusion that justice requires plaintiff to take less by at least three or four thousand dollars. I should so conclude under the severe rule which need not be applied, as we have seen. I assume the court would condemn the recovery except for the thought that it cannot be done without condemning the jury as having acted from some improper motive. I cannot think our judicial machinery is impotent to do justice between man and man in such a case without so first condemning the jury. If a verdict is too large it is as unjust to the

appellant if honestly rendered, or rendered without any improper influence, as if it were otherwise too large. It is the unwarranted size of the verdict which does the mischief, not the cause of excessiveness.

In the foregoing I have not lost sight of the fact that the court cannot properly substitute its judgment for that of the jury. Ordinarily the collective judgment of twelve jurymen on such a subject as the just compensation due in a case of this sort is safer than that of any judge, or perhaps a bench of judges. But whether a jury exercised sound judgment, tested by whether the bounds of reason were plainly overstepped, or a proper conception of the situation was entertained, as well as whether the result is characterized by good faith, are judicial questions. In solving such the court does not invade the province of the jury.

McPHERSON, Appellant, vs. GREAT NORTHERN RAILWAY COMPANY, Respondent.

October 6—October 26, 1909.

Master and servant: Injury to servant: Assumption of risk: Contributory negligence.

1. A servant engaged in unusually hazardous building and repairing operations, where he knows that conditions are constantly changing, assumes all the risks ordinarily present in such dangerous operations.
2. A servant engaged in repairing a railroad bridge, who, while working under the track, reached up and placed his hand on the rail without looking to see whether a push car, which he knew might be run over the track at any time, was in use or not, was guilty of negligence, precluding recovery for injuries to his hand by the car.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action for personal injuries. The facts were not materially in controversy. In July, 1908, the Kelley-Atkinson Company were engaged in repairing the draw span of the interstate bridge between Superior and Duluth which had been wrecked two years previously. The draw span had been raised from the water and rested upon the central pier at right angles with the remainder of the bridge, and the Kelley-Atkinson Company had been for about two months at work repairing and restoring the iron and steel work. To carry material from one place to another on the bridge the company had constructed a railroad track of ordinary width in the middle of the span, and from one end of it to the other, on which a push car eight feet long and two and one-half feet high was shoved by the employees as occasion required. The ties on which the track rested were some six or seven feet apart. About the center of the span and by the side of the track (but three or four feet below it) was a platform of planks, fifteen or twenty feet long, laid between two girders eight feet apart, which formed a kind of a large box in which the employees of the construction company kept most of their tools and some gearings and wooden blocks, etc. The plaintiff was a steel worker and was employed by the construction company in the repair work for several weeks before the 3d of July, 1908, and knew all about the track and the use of the car. Two or three days before the last-named date a gang of six carpenters was put to work on the draw span by the defendant, placing new woodwork between the rails of the street railway track on the span. The timber which this gang was to use was placed at one end of the bridge, and, in order to remove a part of it to the other end, two of the carpenters, by direction of their foreman, loaded a quantity on the push car and began to shove the push car towards the other end, bending forward as they walked, and stepping on the iron rails because the ties were so far apart. In this position they could not and did not look ahead. This was on the 3d of

July, 1908, at about 11 o'clock a. m. The plaintiff was on the bridge at the time, near the center, and just before the car started saw that a portable forge had been upset so that some fire had started in the timbers and wood in the tool box, and he got down in the box and stood on a gearing and began throwing the burning wood out of the box into the bay. As he did this, he took hold of the rail of the push-car track with his left hand. He was facing the track, but paid no attention to it, nor did he look to see whether a car was coming. While he was in this situation the car was pushed along the track over his hand, inflicting injuries which laid him up for several weeks. A verdict for the defendant was directed, and the plaintiff appeals.

The cause was submitted for the appellant on the brief of *Victor Linley,* and for the respondent on that of *J. A. Murphy,* attorney, and *W. M. Steele,* of counsel.

WINSLOW, C. J. It is evident from the statement of facts that a verdict for the defendant was properly directed. The plaintiff was engaged in unusually hazardous building and repairing operations, where he knew that conditions were constantly changing, and he assumed all the risks ordinarily present in such dangerous operations. *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 99 N. W. 217. He knew that the push car was liable to be used at any time. He testifies that he knew that his gang was not using it at the time, but the testimony is undisputed that any gang that happened to be at work on the bridge and found the use of the car helpful was free to use it. The plaintiff knew that the carpenter gang was at work on the bridge, and knew that they had a quantity of bulky material there which must necessarily be distributed along the bridge. Under these circumstances we think it clear that he was negligent in grasping the rail as he did without looking to see whether the car was in use or not.

By the Court.—Judgment affirmed.

GILCHRIST and others, Executors, Appellants, vs. HIGHFIELD and others, Respondents.

October 7—October 26, 1909.

Corporations: Purchase of own capital stock.

A corporation has power to purchase shares of its own capital stock when such purchase is made with no illegitimate or fraudulent purpose and no rights of creditors suffer thereby. TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This action was brought by plaintiffs, as executors of Ella J. Potter, a stockholder in the Webster Manufacturing Company, to declare invalid a purchase of 364 shares of its stock by the corporation and the payment therefor of $25,480 of corporate money, and to compel the three directors voting for such purchase, namely, *Highfield, Gard,* and *Alvord,* to refund to the company such sum so paid. Webster Manufacturing Company was organized for the general purpose of manufacturing chairs. It had $225,000 of nominal stock divided into 2,250 shares, all of which, except 119 shares, were outstanding. *Highfield* and Brigham, in equal partnership, owned 1,126 shares. For several years they had been the two active managing officers for the company, *Highfield* as business manager and Brigham as superintendent of manufacture. Their personal relations had become strained so that they could not work harmoniously together, and Brigham had insisted that one or the other must get out, and either his stock must be bought so that he could retire from the company, or *Highfield* must sell out and withdraw. In pursuance of this view he gave an option to sell his 564 shares of stock at $70 per share to *Highfield* or the corporation in July, 1907. The last previous financial statement of January 1, 1907, showed assets of the company $214,519 in

excess of all liabilities and of the capital stock at par and absence of any debts except current payroll. *Highfield* availed himself of the option to buy 200 shares, which, it appears, was up to the extent of his financial ability. A directors' meeting was then held, at which the three defendant directors and Brigham voted that the corporation purchase the remaining 364 shares upon the option, and accordingly that stock was assigned to the corporation, the certificates canceled and new certificates issued, and the purchase price paid to Brigham, who is not made a party to this action. At the next ensuing stockholders' meeting the act of the directors in making such purchase was fully ratified, such ratification, however, requiring the support of *Highfield's* votes to supply the majority. The court held that the purchase of the stock was in accordance with good business judgment in the interest of the corporation and for no ulterior or improper purpose, and rendered judgment dismissing the action, from which plaintiffs appeal.

For the appellants there was a brief by *Luse, Powell & Luse,* attorneys, and *H. R. Spencer,* of counsel, and oral argument by *L. K. Luse.*

For the respondents the cause was submitted on the brief of *H. V. Gard.*

DODGE, J. The purchase of the 364 shares of stock by the corporation from Brigham is claimed to be wholly void upon the ground asserted that a corporation has no power to buy its own capital stock. This contention seems to need little discussion. While the English authorities are to that effect, and while similar holdings have been made in some of the states, the great weight of authority is in favor of such power, when exercised with no illegitimate or fraudulent purpose and when no rights of creditors suffer thereby. In the face of this conflict of decision this court long ago, upon support from the supreme court of the United States, adopted the

view that, generally speaking, corporations have such power, and has persisted therein so long that we have no doubt property rights of great magnitude have grown up in reliance thereon. *Shoemaker v. Washburn L. Co.* 97 Wis. 585, 73 N. W. 333; *Calteaux v. Mueller,* 102 Wis. 525, 78 N. W. 1082; *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226; *Pabst v. Goodrich,* 133 Wis. 43, 113 N. W. 398; *Atlanta & W. B. & C. Asso. v. Smith,* 141 Wis. 377, 123 N. W. 106. The law in this state must be considered so settled.

Another contention is that, conceding such power in the corporation, the defendants, acting on the board of directors and also voting their stock in ratification of the directors' act, were actuated by a purpose to deprive the plaintiffs of their just rights in the corporation, especially by reducing the amount of the voting stock so that defendants would hold a majority thereof—a purpose which was condemned in *Luther v. C. J. Luther Co.* 118 Wis. 112, 94 N. W. 69. But the trial court has found against the existence of any such motive, or any ulterior or illegitimate intent or purpose other than the promotion of the best interests of the corporation according to the honest judgment of the defendants. This finding, we think, is fully supported by a preponderance of the evidence and must preclude any interference by a court with acts in pursuance of the business policy adopted in good faith by the holders of a majority of the capital stock. *Theis v. Durr,* 125 Wis. 651, 659, 104 N. W. 985; *Figge v. Bergenthal,* 130 Wis. 594, 616, 109 N. W. 581, 110 N. W. 798; *Gamble v. Queens Co. W. Co.* 123 N. Y. 91, 99, 25 N. E. 201.

By the Court.—Judgment affirmed.

Timlin, J. (*dissenting*). I have no doubt that under some exceptional circumstances, as where the transaction does not affect the creditors injuriously and all the shareholders consent, or where a purchase is necessary to realize

upon a prior existing demand of the corporation which might otherwise be lost, and such like cases, a court will not disturb the act of a corporation in buying in shares of its own stock when such act is not expressly forbidden by statute. There is in all such cases a corporate interest subserved by so doing, outside of the mere advantage of the act of purchase. The acquiescence of the other shareholders, or the fact that they sustained no pecuniary loss thereby, suffices to close the doors of a court of equity against them, and the attack is usually, if not always, made in equity. But it is quite another question whether the office-holding majority can use the corporate funds or credit for this purpose against the protest of the minority shareholders and so preserve the control of the corporate offices by the former and deprive the minority of dividends by thus disposing of the surplus properly applicable to the payment of dividends, or by thus creating corporate debts which must be met before dividends are paid. I cannot bring myself to believe that the decision of this case by the majority of the court is either correct in principle, supported by precedents in this state, or conforming to statutes of this state or to wise policy. It has been said by those competent that in no other civilized country have the rights of minority shareholders so little consideration as here, and it would not, I think, be extravagant to say that the belief prevails here that the shareholders in a stock corporation are not sufficiently protected by the courts against the manipulations and frauds of the majority shareholders or of the directors and officers, who often regard themselves as the mere tools of the majority which placed and holds them in office. I wish to enter a protest against the decision by the majority as fostering just such evils and injustice.

The relevant facts are: The Webster Manufacturing Company is a stock corporation organized and existing under the laws of Wisconsin for the purpose of carrying on the business of manufacturing. There was nothing in its articles of

organization authorizing it to buy its own shares. Its authorized capital stock was 2,250 shares of the par value of $100 each, and its issued and outstanding capital stock held by shareholders at the time of the option agreement hereinafter mentioned was 2,130.9 shares. *A. W. Highfield* and C. F. Brigham, as copartners, owned 1,126 of said shares since February, 1904. *Highfield* owned fifty-two shares individually and Brigham one share, and they of course controlled the corporation, and during this time *Highfield* was president and Brigham secretary, and both directors. On January 1, 1907, as shown by the books of the corporation, the liabilities, outside of capital stock liability, amounted to only $3,866.49, and the assets, after deducting a capital stock liability of $225,000, showed a surplus of $214,519.65. This left the book value of each share outstanding at $204.40 plus. The minority shareholders had been for some time dissatisfied with the conduct of the business of the corporation, particularly with reference to paying dividends—only two dividends having been declared in ten years prior to July, 1907, one of five per centum and another of six per centum. The remaining 951.9 shares outstanding were held, 500 shares by the plaintiffs as executors. 137 shares by other persons who were directors, and about 314 shares by ordinary unofficial shareholders. June 10, 1907, Brigham executed to *Highfield* and the corporation an option by the terms of which either *Highfield* or the corporation might buy his 564 shares within thirty days at $70 per share. Within the thirty days thereby fixed *Highfield* accepted the option as to 200 of the 564 shares, and the board of directors, for the corporation, accepted it as to 364 shares. Evidence to show that *Highfield* borrowed the money from the corporation to buy this 200 shares was offered and rejected. *Highfield* paid for and received the 200 shares, and the corporation paid out $25,480 for and received the 364 shares. The plaintiffs had no notice of this purchase until some time in October, 1907, and they

objected to it. At the ensuing annual shareholders' meeting in January, 1908, a motion was made to ratify the action of the directors in purchasing these 364 shares of stock for the corporation, and *Highfield* voted 815½ shares in favor of such ratification, *Gard,* one of the directors making the purchase, voted fifty-two shares in the same way, and forty other shares were voted, making 907½ shares for ratification; and 605½ shares, including the plaintiffs', voted against such ratification.

The circuit court found that $70 per share, the price paid for the Brigham shares, was fair and reasonable, and that differences existed between *Highfield* and Brigham which threatened to injure the business of the company and it did not seem practicable for both to remain in the corporation; that the directors believed that an attempt was being made by a competing manufacturer to get control of the corporation by purchase of the Brigham stock and the stock of plaintiffs, and that this would be detrimental to the interest of the latter corporation, and in the purchase of the Brigham stock for the corporation the directors acted in good faith and believed they were acting for the best interests of the corporation. There is an apparent inconsistency between the thirteenth finding, to the effect that the corporation had at the time of the purchase of the Brigham stock a net surplus of assets over and above liabilities, including liability to capital stock, amounting to $214,500, and the sixteenth finding, to the effect that the price of $70 per share paid by the corporation for the Brigham stock was fair and reasonable. If the fair and reasonable value of the shares was $70 each, then there was at the same valuation no surplus and insufficient assets to balance capital stock. This would indicate that the assets were overvalued on the books of the corporation, or that in the one case the cash market value was considered, which was much less than the value of unconverted assets.

When a corporation possessing property consisting of land,

merchandise, raw material, bills and accounts receivable, and cash, buys in its own shares for cash against the protest of the minority shareholders, it thereby not only decreases its assets applicable to the payment of dividends, but also, against the will of the dissenting stockholders, decreases the corporate assets and increases the fractional interest of such shareholder in the residue of the assets. This is so whether the shares purchased in by the corporation be canceled and retired or whether they be held by the corporation as outstanding, as a little reflection will show. In such case the corporation in effect says to the dissenting shareholder: "You shall no longer have your former fractional interest in real estate, material, merchandise, bills and accounts receivable, and cash; but you shall from henceforth have a larger fractional interest in a reduced total of less desirable property." Every one knows that this is not an equivalent in value of his former holdings. A portion of cash capital is essential to the enjoyment and realization of the full value of the other property. The remaining property is not available for the payment of dividends, but must be converted into cash for that purpose. On the other hand, if the corporation has no cash or no sufficient cash with which to buy the offered shares and is obliged to incur a corporate debt in order to make the purchase, the value of the shares of the objecting shareholder is still further impaired and his chance of obtaining dividends still more remote, because it will then require payment of the debt thus incurred as well as conversion of the property into money before he can expect a dividend.

Men invest their money in corporate enterprises for the principal and lawful purpose of receiving dividends thereon. The primary object in the organization and operation of a stock corporation is to pay dividends. Any act which prevents or postpones this corporate function is necessarily a wrong and injustice to the minority shareholder. The purchase by a corporation of its own stock not only changes the

fractional interest of the dissenting shareholder against his will, but it changes the character of his property in which he has an interest, deprives him of the chance of dividends, increases against his will his proportionate liability to clerks and servants and laborers under sec. 1769, Stats. (1898), and also is effectual in silencing and eliminating a shareholder (the seller to the corporation) who might vote with the dissenting shareholders at the next corporate election and against the office-holding majority. Aside from any question of good faith or bad faith, it ought to require a pretty clear statutory authority to justify such jockeying with the rights of others.

Other objections are found to the exercise of such a power. 3 Thomp. Comm. on Corp. § 3701. Here that author says, speaking of the liability of a shareholder holding shares as trustee:

"If the vicious doctrine prevails in the particular forum that a corporation can be the general owner of its own shares, just as a man can be the owner of his own promissory note, and if the corporation sees fit to own, so to speak, its own shares, by having them vested in a trustee for its own use, then it is difficult to say how such a court would answer this question, because a court that can fall into the aberration of holding that a man can be the owner of his own debt can fall into any other species of judicial aberration."

Let us see what the statutes are.

"The property of any corporation organized under any special or general law shall be used only for the purposes prescribed by such law or by its articles of organization in pursuance thereof." Sec. 1767, Stats. (1898).

That is, not purposes prescribed by law, but prescribed by the law (statute) under which the corporation is organized. These purposes are enumerated in sec. 1748 and sec. 1771, Stats. (1898), and buying its own shares is not one of them either expressly or by implication. Other statutes *in pari materia* recognize this. For example: A special authorization

to buy in its own stock was thought necessary in case of certain specified corporations. Sec. 1784. Corporations like that in the case at bar might not even buy or hold shares in other corporations except upon the assent of three fourths of its shareholders. Sec. 1775, Stats. (1898). It is quite strange if the power to buy in its own shares, the exercise of which breaches its contract with its own shareholders dissenting, can be exercised upon less authority. The corporation shall have powers conferred by these statutes necessary or proper to conduct the business or accomplish the purposes prescribed by its articles, but no other or greater. Id. The corporation may amend its articles so as to diminish its capital stock, but only in the manner provided by statute or in its articles of incorporation. Sec. 1774.

Turning to the decisions of this court upon the question of the power of a corporation to purchase its own stock, the first is *Shoemaker v. Washburn L. Co.* 97 Wis. 585, 73 N. W. 333, where there were no existing creditors and the shareholders all consented to the transaction. This surely is no precedent that such purchase may be made against the objection of a shareholder. The next is *Calteaux v. Mueller,* 102 Wis. 525, 78 N. W. 1082, where it was decided that a tender of its own shares to the corporation in discharge of a corporate debt, where the secretary and business manager had agreed, when the debt was contracted, to receive these shares in payment, was not a good defense. This is certainly no precedent, and it should not be necessary at this late day to say that broad general rules stated in the opinion or written into the syllabus of a case, where only this narrow question was before the court, are not law, unless this court has rightfully and constitutionally entered the field of legislation. The next case is *Marvin v. Anderson,* 111 Wis. 387, 87 N. W. 226, where all the shareholders and directors acquiesced in the transaction and treated it as valid for nearly two years. This is no precedent for holding that the purchase may be made against the

will of the other shareholders, although we find the same general dictum in this opinion and in the two cases of *Shoemaker v. Washburn L. Co., supra,* and *Calteaux v. Mueller, supra. Pabst v. Goodrich,* 133 Wis. 43, 113 N. W. 398, was also a case where the shares had been purchased in by the corporation with the acquiescence, if not with the express consent, of all remaining shareholders, and thereafter reissued as a stock dividend to the remaining shareholders. The statement in the opinion to the effect that a corporation has power to purchase its own shares is of course applicable to the facts there before the court only.

The appellants' attorneys cite to us the following: 10 Cyc. 760, 762; *Railway Co. v. Allerton,* 18 Wall. 233; *Madison, W. & M. P. R. Co. v. Watertown & P. P. R. Co.* 7 Wis. 59; *Clark v. Farrington,* 11 Wis. 306. I have not time to examine the cases cited in Cook on Corporations (6th ed.) §§ 309 to 312, but it seems to me that few, if any, of these cases go to the extent that the instant case does in permitting such purchase by the corporation. The case of *Dupee v. Boston W. P. Co.* 114 Mass. 37, cited by Cook, certainly does not, because that was in effect a sale of the corporate real estate to the shareholders in exchange for shares of stock and in no wise affected the power to pay dividends.

This is therefore a new question in this court and not controlled by precedent, and under our statutes, fairly construed, the directors of a stock corporation have no power, against the will of the shareholders, to pay out the corporate funds otherwise applicable to dividends for purchase of shares of the corporate stock; and in the case at bar, notwithstanding the differences between the president and secretary, the fears of the directors, or their good faith (which the court below was very liberal and charitable in finding on the evidence), such directors had no power or authority to divert the corporate assets from the payment of dividends for the purpose of purchasing shares, nor to so change the position of the plaintiffs

by the purchase of shares as this record shows they have done, nor to buy off the probable opposition of the rebellious or quarrelsome secretary by the purchase of his shares and so perpetuate themselves in control and prevent the secretary from voting with the other faction at the next ensuing corporate election. If we were to ask any practical business man whether these shares belonging to the estate of Potter were worth as much after this transaction as before, the answer would not be doubtful.

While there has heretofore been no decision in this state going as far as the instant case, there are no doubt some illy considered cases elsewhere which lend color of authority to the majority decision. I see no way to change this deplorable condition except to bear with patience such frauds until they have become so noteworthy and numerous as to bring about the downfall of the mistaken rules which fostered them or to call upon the legislature for relief.

RICHEY, Respondent, vs. UNION CENTRAL LIFE INSURANCE COMPANY, Appellant.

October 7—October 26, 1909.

(1) *Pleading: Election between causes of action.* (2–6) *Contract of employment: Wrongful discharge: Insurance agency: Damages: Loss of future profits: Reduction by other earnings.*

1. It was not prejudicial error to refuse to compel plaintiff to elect on which of two causes of action he would proceed, where the second was pleaded for the sole purpose of claiming a recovery for labor and services in case the contract of employment alleged in the first was found not to have been made, and plaintiff at the close of his affirmative case discontinued as to the second cause of action and apprised defendant that he stood on the contract and its alleged breach.
2. Under proof that a contract of employment was not terminated because plaintiff failed to comply with any of its conditions or

obligations, nor because he failed to conduct the business in a satisfactory manner, it is no defense to an action for its breach by the employer that the contract authorized discharge for such failures.

3. Damages recoverable for breach of contract must be reasonably certain and the proximate result of the breach, excluding all merely speculative or imaginary damages.
4. Although the elements of future damages for breach of contract may be involved in some uncertainty and contingency, yet if, from the facts shown, it can be inferred with reasonable certainty that the breach caused the other party pecuniary loss, compensation therefor should be recovered even though future profits may be involved in its ascertainment.
5. Proof of the amount of business done by plaintiff up to the time of his discharge, during two years of an agreed ten-year period of employment as district agent of a life insurance company; of his organization of his territory and investment of money with a view to enlarging his business for the remaining eight years; of the reasonable probability that he would do an increasing business; and that he was prevented from reaping the profits thereof only by the company's wrongful termination of his agency,—shows resulting damages with reasonable certainty and justifies recovery thereof.
6. In an action for the breach of the contract by the insurance company, whereby the agency business which plaintiff had built up was destroyed, the damages recoverable are not subject to be reduced by the amount which he earned in other employment after the breach and before trial.

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

About December 1, 1905, the defendant contracted to employ the plaintiff for ten years as a district agent in several of the counties in the northern part of the state for the sale of life insurance on commission. Plaintiff entered upon the performance of the contract, devoted himself to the work of building up a business, and expended his earnings in furtherance thereof. About January 1, 1908, the defendant, claiming that it was compelled, in the interest of its policy-holders, because of the oppressive laws of Wisconsin, to withdraw from the state and cease to do business here, canceled its contract with the plaintiff and discharged him from its employ.

Plaintiff brought action against the defendant, setting up two causes of action: (1) For the breach of the contract; and (2) for the labor performed and for the money expended by him for the defendant. The plaintiff introduced evidence before the referee to whom the action had been referred tending to show that he had written insurance during the first year of his employment by the defendant from which he derived $868 in premiums, and over $1,300 during the second year; that his commissions on the business so written would, if renewed annually, amount to over $200 per year for the unexpired term of his contract; that he had expended money in traveling about his district, in advertising the company, and in developing the territory with a view to future profits; that the greater part of the work incurred in establishing such a business was during the first two years; and that he had expended time and effort in selecting and appointing subagents who would be efficient in the prosecution of the business.

Plaintiff, at the conclusion of the testimony, elected to stand on the first cause of action, and the referee reported in favor of allowing plaintiff $2,750 as the damages caused by the breach of the contract. The circuit court approved the report of the referee and awarded plaintiff judgment upon the report. This is an appeal from the judgment.

W. H. Stafford, for the appellant.

W. M. Bowe, for the respondent.

Siebecker, J. The point made that the appellant was prejudiced by the refusal of the trial court to compel respondent to elect which of the two causes of action alleged in the complaint he would proceed on has no merit. The facts of the so-called second cause of action were inserted for the sole purpose of claiming damages for labor and services in the event that no binding contract should be found to have been made by the parties as alleged. The respondent, at the con-

clusion of his affirmative case, discontinued as to these allegations and apprised appellant that he stood on the contract and its alleged breach by the appellant. There was nothing to mislead appellant or to interfere with its defense to respondent's demands.

It is insisted that no breach of the alleged contract is shown. The argument is that the appellant had the right to terminate its agreement with respondent under the stipulation that, if respondent failed "to comply with any of the conditions, duties, and obligations . . . or to conduct his business in a satisfactory manner, then" appellant might at its option terminate the contract. Under the allegations and proof on this subject it is not claimed or shown that the agreement was terminated because respondent failed to comply with the imposed conditions, duties, and obligations, or because he failed to conduct his business in a satisfactory manner. Under these circumstances appellant cannot assert that the agreement was terminated under the foregoing stipulation and this claim need not be further considered.

The main contention is that the evidence does not justify the damages awarded by the court for the breach of this contract. The record presents a case of facts showing that the appellant made an agreement with the respondent whereby he was appointed appellant's agent for a portion of this state to solicit persons to take insurance with the appellant and to collect and pay over the premiums on all the insurance effected by him, requiring him to devote all of his time and efforts to such business for the period of ten years. Respondent entered upon the performance of his duties and obligations and effected insurance and collected premiums for the period of two years. He organized the territory allotted to him, secured persons to work under his direction, and expended money in establishing an insurance business to be carried on under the appointment so made. At the expiration of two years appellant breached the agreement by an unjusti-

fiable termination thereof, and thereby prevented respondent from continuing as its insurance agent in the business so organized. The claim is that the respondent has been compensated for the insurance he had effected and the premiums collected by him to the time of the alleged breach, and that no damages could be awarded for prospective losses, because they were speculative, imaginary, and uncertain, and therefore too remote to be recoverable in the law. The damages recoverable for a breach of contract must be reasonably certain and the proximate result of the breach. This excludes recovery of all merely speculative, possible, or imaginary damages. The inquiry in each claim for future damages for breach of contract is whether or not they are traceable as the result of the breach. In all such cases the elements of the damages are involved in some uncertainty and contingency; yet if under the facts shown it can be inferred with reasonable certainty that the breach caused the other party to the agreement pecuniary loss, then he should be allowed to recover compensation to make good the loss, and this though consideration of future profits may be involved in its ascertainment.

The adjudications on this subject are not harmonious in their conclusions, nor is there any uniformity as to what are held to be remote and what proximate damages. Under the decisions of this court it is established that:

"Where the profits lost are such as the parties, at the inception of the contract, had in contemplation, and the person guilty of the breach of it must reasonably have anticipated would result therefrom to the other party, and there is evidence sufficient to furnish a legitimate basis for their determination, by the exercise of sound judgment on the part of the jury, they constitute a proper measure of damages, and are recoverable." *Schumaker v. Heinemann,* 99 Wis. 251, 257, 74 N. W. 785.

This rule was there applied and held to allow recovery for breach of contract of a traveling salesman who was to be compensated by commissions on the sales made, and was allowed

to recover damages for the prospective sales for the unexpired period of the contract, when it was terminated. Other cases in this court to the same effect are *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896; *Cameron v. White,* 74 Wis. 425, 43 N. W. 155.

There is evidence in the case showing the amount of business respondent did during the first two years of the contract period; that he had organized it with a view to enlarging and increasing it for the eight remaining years, and to this end he invested his money in the business; that he was very successful as an insurance solicitor and business promoter; that the prospects for doing a future business, with the enterprise so established, were favorable; that in all reasonable probability he would do an increased business; and that he was prevented from reaping the benefits therefrom only by appellant's termination of his agency. This is ample proof to show with reasonable certainty that damages resulted to respondent, and justified the trial court in its conclusion to allow the amount of damages awarded for the breach of the contract.

The point is made that the amount of damages so found should have been reduced by what the respondent earned outside of the contract employment after breach and before trial. The court properly refused this deduction. This is an action to recover the damages caused by the breach of the contract to respondent's agency business, built up under this agreement. When appellant terminated the agreement and destroyed the business its liability became fixed. It was responsible for the value of the agency business as it then existed and which went out of existence by its illegal act.

There is no error in the record.

By the Court.—Judgment affirmed.

BERG, Respondent, vs. TOWN OF AUBURN, Appellant.

October 7—October 26, 1909.

Highways: Injuries from defects: Deposit of materials for repair: Frightening horses: Negligence: Evidence: Special verdict.

1. **Town authorities have the right to deposit material in the highway at convenient and proper places for the purpose of repairing the same, in the exercise of ordinary care; but they have no right to so place such material as to render the highway dangerous to travelers, and permit it to remain an unreasonable time.**
2. **Findings in a special verdict to the effect that an iron pipe two and a half feet in diameter, twelve feet long, painted red, which the defendant town had placed about eight feet from the traveled track and permitted to remain there for eleven days, was an object likely to frighten horses of ordinary gentleness, and that defendant was negligent in allowing it to remain where it did, are *held* to be sustained by the evidence.**
3. **The findings above mentioned, together with findings that defendant's negligence was the proximate cause of plaintiff's injury, that plaintiff was not guilty of contributory negligence, and assessing his damages, are *held* sufficiently to have covered the material controverted issues, especially in the absence of any request for the submission of other questions.**

APPEAL from a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

This is an appeal from a judgment recovered against the defendant town in a personal injury action. The plaintiff's horse shied at a piece of iron culvert pipe placed in a public highway by authority of the town officers, and the plaintiff was thrown from a buggy and injured. The jury returned the following verdict:

"(1) Was the pipe in the position and condition it was allowed to remain by the defendant an object likely to frighten horses of ordinary gentleness driven along the highway? *A.* Yes.

"(2) Was the defendant guilty of any negligence in allow-

ing the pipe to remain in the position and condition it did remain? *A.* Yes.

"(3) If your answer to question 2 is 'Yes,' then was such negligence the proximate cause of the plaintiff's injury? *A.* Yes.

"(4) Was plaintiff guilty of any want of ordinary care that contributed to produce his injury? *A.* No.

"(5) If the court is of the opinion that plaintiff is entitled to recover, then in what sum do you assess his damages? *A.* $200."

At the close of the evidence on the part of the plaintiff the defendant moved for a nonsuit, which was denied. Motions were made by defendant to change the answers to question No. 2 from "Yes" to "No," and to question No. 4 from "No" to "Yes," and for judgment on the verdict as so amended, and also that the verdict be set aside and for a new trial, which motions were denied.

For the appellant there was a brief by *W. M. Bowe* and *D. E. Cook,* and oral argument by *Mr. Bowe.*

Alexander Wiley, for the respondent.

KERWIN, J. 1. Error is assigned because of the refusal of the court to grant defendant's motion for nonsuit and the refusal to amend the special verdict and order judgment for the defendant. This contention is based upon the idea that the pipe placed in the highway was not unlawfully there and was not of such a character as to amount to an obstruction or render the highway defective, and that the pipe having been placed upon the highway for the purpose of repairing a culvert therein it was lawfully there, hence there was no liability on the part of the town. The evidence shows that the highway in question ran east and west, and that the iron culvert pipe was two and one-half feet in diameter and about twelve feet long and painted red; that it lay about eight feet from the north wheel track, and that the road was about sixty feet wide; that on the south side of the road was considerable

brush, and the distance between the south wheel track and the south fence was over two rods. There was also a piece of pipe about nine feet long on the south side of the traveled track, which pipe lay in the brush pretty close to the fence and about one and one-half rods from the main traveled track. The pipe was of such a character that it frightened horses. It was allowed to remain in the highway eleven days. There was some brush thrown upon it which covered it as long as the leaves on the brush remained green, but after the leaves dried it looked worse than if it had not been covered at all. For about a week before the accident the pipe had only a little brush on it. The west end of the pipe was practically bare, the sun having dried the leaves and the wind taken off some of the brush.

It is plain from the evidence that the town authorities in covering the pipe with brush recognized the fact that a pipe of such size and painted red as it was and in such close proximity to the traveled track was calculated to frighten horses, and, upon the evidence showing the length of time it was permitted to remain in the condition it was after it became exposed, the jury were warranted in finding that it constituted a defect in the highway and negligence on the part of the town authorities in permitting it to remain. While it is doubtless true that the town authorities would have the right to place material in the highway at convenient and proper places for the purpose of repairing the same in the exercise of ordinary care, it is also true that they have no right to so place such material in such position as to render the highway dangerous to the traveling public and permit it to remain an unreasonable length of time in such position. *Foshay v. Glen Haven,* 25 Wis. 288; *Loberg v. Amherst,* 87 Wis. 634, 58 N. W. 1048; *Laird v. Otsego,* 90 Wis. 25, 62 N. W. 1042; *Carlon v. Greenfield,* 130 Wis. 342, 110 N. W. 208.

In *Carlon v. Greenfield, supra,* this court held that, where

material is deposited by the town authorities for the purpose of repairing culverts, the officers of the town are required to exercise reasonable care in selecting a place least calculated to frighten ordinarily gentle horses in the use of the road, and we think in the case at bar it was a question for the jury to determine whether the authorities of the town were negligent in depositing the pipe where they did and permitting it to remain for a period of about eleven days, during the last week of which time it was practically uncovered and in plain sight of horses traveling upon the highway. In *Halstead v. Warsaw,* 43 App. Div. 39, 59 N. Y. Supp. 518, it was held in a case where the authorities of the village had been using a steam roller to improve its street, that when the work upon the street was suspended for the day, if an obstruction to the unrestricted use of the highway, such obstruction should be guarded so as not to menace the traveling public; and it was further held that it was for the jury to say whether a steam roller left upon the highway would tend to frighten horses, and, if so, it was incumbent upon those having charge of it to have it removed from the street when the work was completed for the day. See, also, *Eggleston v. Columbia T. R. Co.* 82 N. Y. 278. In the case at bar the jury would have been justified in finding that the pipe deposited was of such character as to frighten horses of ordinary gentleness, and that the authorities of the town failed to exercise reasonable care in placing and maintaining such pipe as it was placed and maintained for a period of about eleven days before the accident.

2. Error is also assigned in the submission of a special verdict on the ground that the material controverted issues were not submitted. It appears from the record that no request for a special verdict or any questions, nor for instructions, was made by the defendant. The evidence was in conflict as to whether or not the pipe rested against the fence or was placed at a distance of about four feet from the fence.

It also appears that the space from the south side of the traveled track to the fence was a little over two rods, and that there was considerable brush on the south side covering a short piece of pipe placed on that side, being about one and one-half rods from the main traveled track. So we think on the facts in the case the controverted issues were sufficiently submitted to the jury, and especially so in the absence of any request on the part of the defendant for other questions. The main questions for the jury to determine were whether the pipe, in the position and condition in which it was allowed to remain, was an object likely to frighten horses of ordinary gentleness, and whether the defendant was guilty of negligence in allowing the pipe to remain in such condition and thereby render the highway defective. The answers to these questions in the affirmative upon sufficient evidence established the fact of the defective condition of the highway through the negligence of the defendant. *Carlon v. Greenfield,* 130 Wis. 342, 110 N. W. 208; *Tinker v. N. Y., O. & W. R. Co.* 71 Hun, 431, 24 N. Y. Supp. 977.

The defendant also excepted to the following instruction:

"You are instructed that the defendant had a right to store the pipe in the highway a reasonable length of time, providing it exercised ordinary care in so storing it;" and the further instruction: "In considering whether or not the defendant was guilty of any negligence in allowing the pipe to remain in the position and condition it did remain, you will consider, among other things, the position and condition of the pipe as shown by the evidence, also the length of time it was allowed to remain in the highway."

We see no objection to these instructions, and think they were in line with the law as laid down by this court. *Carlon v. Greenfield, supra; Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311. We find no reversible error in the record, and think the case was fairly submitted to the jury; hence the judgment of the court below must be affirmed.

By the Court.—The judgment of the court below is affirmed.

LEHMAN, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

October 7—October 26, 1909.

Master and servant: Injury from defective tools: Simple tools: Duty to "inspect:" Contributory negligence: Questions for jury: Proximate cause: Special verdict: Presumption as to findings on omitted facts: Instructions to jury: Evidence: Immaterial errors.

1. A pick or hammer used by locomotive firemen for breaking up coal and consisting of a wooden handle about three feet long inserted in an iron cross-head having a hammer face on one end and pick point on the other is a simple tool which the master is not bound to inspect to ascertain the development of defects or disrepair in the course of its use.
2. In an action by a locomotive fireman whose eye was injured by a piece of coal flying into it when he struck a large lump of coal with a pick or hammer which was defective by reason of its face having become worn and rounded by use, the question whether, in seizing the hammer and striking the blow without looking at it at all, the plaintiff exercised ordinary care, was a question of fact for the jury.
3. In the rule that a servant is not bound to *inspect* machinery and appliances furnished by the master, but may rely upon the master to furnish safe tools and appliances, the word "inspect" refers to a somewhat careful or critical examination; and a servant may be negligent in using a tool without even glancing at it, if, as a matter of fact, ordinarily prudent and careful persons are accustomed to look at such tools before using them under similar circumstances.
4. It cannot be held in such a case that because the servant did not know of a defect in the tool he could not have anticipated that an injury might result therefrom and therefore that his omission to look at it did not proximately contribute to an injury so resulting. He must be deemed to have known that which he would have learned had he exercised ordinary care.
5. It is not essential to the existence of a legal causal relation between a servant's negligence and an injury sustained by him that he should have anticipated the precise injury which occurred. It is sufficient if the negligent act was one from which an ordinarily prudent person might anticipate some injury to himself.
6. Whether findings in a special verdict, to the effect that a simple tool which a servant was using when injured was in a defective

condition and that such defective condition was the proximate cause of his injury, were sufficient or insufficient to convict the master of negligence, not determined.

7. If in such a case the special verdict was insufficient upon the question of defendant's negligence, the court, having rendered judgment for the defendant, will be deemed to have determined upon the evidence that defendant was not negligent. Sec. 2858m, Stats. (Laws of 1907, ch. 346).

8. An instruction to the effect that if the tool plaintiff was using was defective, and if by the exercise of ordinary care he "could" have examined it and observed its condition before using it, he was guilty of contributory negligence, was not erroneous because the word "could" was used rather than the words "ought to."

9. Instructions relative to a question upon which the jury found in appellant's favor cannot be assigned as error by him.

10. Appellant was not prejudiced by the admission of evidence relating to a question upon which the jury found in his favor and having no bearing upon any question upon which they found against him.

Appeal from a judgment of the circuit court for Chippewa county: A. J. Vinje, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *W. H. Frawley & T. F. Frawley,* and oral argument by *T. F. Frawley.* They cited, among other cases, *Boelter v. Ross L. Co.* 103 Wis. 324, 79 N. W. 243; *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 54 N. W. 24; *Hardt v. C., M. & St. P. R. Co.* 130 Wis. 512, 110 N. W. 427; *Polaski v. Pittsburgh C. D. Co.* 134 Wis. 259, 114 N. W. 437; *Horn v. La Crosse B. Co.* 123 Wis. 399, 101 N. W. 935; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Ruscher v. Stanley,* 120 Wis. 380, 98 N. W. 223; *Hocking v. Windsor S. Co.* 125 Wis. 575, 104 N. W. 705; *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689; *Bandekow v. C., B. & Q. R. Co.* 136 Wis. 341, 117 N. W. 812; *Bloor v. Delafield,* 69 Wis. 273, 34 N. W. 115; *Anderson v. Chicago B. Co.* 127 Wis. 273, 106 N. W. 1077; *Leque v. Madison G. & E. Co.* 133 Wis. 547, 113 N. W. 946; *Clemons v. C., St. P., M. & O. R. Co.*

137 Wis. 387, 119 N. W. 102; *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777.

For the respondent there was a brief by *Bundy & Wilcox* and *James B. Sheean,* and oral argument by *R. P. Wilcox.* Besides other authorities, they cited *Poluckie v. Wegenke,* 137 Wis. 433, 119 N. W. 188; *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622, 66 N. W. 791; *Holt v. C., M. & St. P. R. Co.* 94 Wis. 596, 69 N. W. 352; *Kucera v. Merrill L. Co.* 91 Wis. 637, 65 N. W. 374; *Reffke v. Patten P. Co.* 136 Wis. 535, 117 N. W. 1004; *Nass v. Schulz,* 105 Wis. 146, 81 N. W. 133; *Dean v. C. & N. W. R. Co.* 43 Wis. 305; *Goltz v. Milwaukee, L. S. & W. R. Co.* 76 Wis. 136, 44 N. W. 752; *McKeon v. C., M. & St. P. R. Co.* 94 Wis. 477, 69 N. W. 175; *Montanye v. Northern E. Mfg. Co.* 127 Wis. 22, 105 N. W. 1043.

TIMLIN, J. The complaint in this case averred that the plaintiff was a locomotive fireman in the employment of defendant. In the performance of such duty he was required to use a pick or hammer for the purpose of breaking the larger pieces of coal preparatory to putting the same in the fire box. In striking the coal with this pick or hammer a piece of coal flew into his eye and injured it. The pick or hammer was defective, in that the outer edges of its face had become worn and rounded from long continued use. The defendant failed in its duty to furnish the plaintiff reasonably safe tools and appliances. The jury found that the pick was in a defective condition and this defective condition was the cause of the plaintiff's injury, but that the plaintiff was guilty of a want of ordinary care which contributed to his injury.

1. Various errors are assigned by appellant, but, the verdict being in appellant's favor on all points submitted to the jury except his contributory negligence, only those alleged errors affecting the verdict and relating to contributory negli-

gence or bearing upon that issue can be considered prejudicial to the appellant. The accident occurred on March 7, 1907, prior to the time at which ch. 254, Laws of 1907, went into effect.

The pick or hammer is an implement having a wooden handle about three feet long inserted in an iron cross-head having a hammer face on one end and a pick point on the other end, and is in all respects a simple tool within the rule of *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419, and cases there cited. The hammer end of this pick originally presented a flat surface which had become battered and convex by use. Were the question properly before us, we would not be inclined to hold that the implement was unsafe or defective in this condition. But, the jury having found that the coal pick was in a defective condition at the time of the accident, the case will be decided upon the hypothesis that this finding is a verity. The third question of the special verdict finding the plaintiff guilty of contributory negligence must bar his recovery unless it ought to be set aside and the answer of the jury changed from "yes" to "no" because of lack of evidence to support such finding.

From the plaintiff's evidence it appears that at the time of the injury he was busy shoveling coal, and in so doing encountered a very large lump of coal which he tried to move with his shovel.

"That was the first time I thought of a coal pick, so I reached up to the usual place where coal picks are kept, right up handy on the right side of the engine—I always carry mine—used to. I reached up there and took the coal pick and got hold of the coal pick, and I struck the coal and was struck in the eye. I reached up on the right-hand side of the engine and got the pick and stepped down and struck it, and tried to break it so it would all come out. It could not come out the way it was. It was too big; too long; and the first blow I struck it flew up and struck me in the eye."

He had not prior to that time ascertained whether there was a pick on the engine or not, evidently presuming that the

engine carried a pick as usual, and he further testified upon cross-examination that he did not make any examination of the pick before he struck the coal, did not look at it at all, did not look to see what kind of a face it had on it, or whether it was a new pick or an old pick; just caught it up by the handle and took a swing at the coal. He was an experienced fireman, and claimed to know that picks of this kind so battered as to present a convex surface on the hammer end were apt to cause coal splinters to fly, but did not know that the pick in question was in this condition, and did not look at the pick for the purpose of ascertaining.

The question of the contributory negligence of one injured by the negligence of another is usually a question of fact. The question whether one seizing a pick, a hammer, or an ax, and striking a blow with it without even glancing at the condition of the implement, is in the exercise of ordinary care, seems to be peculiarly a question of fact for the jury. The more general rules that there is no duty on the part of the servant to inspect machinery and appliances furnished by the master, and that the servant may rely upon the master to furnish safe tools and appliances, do not at all conflict with this conclusion. Inspection means a somewhat careful or critical examination. *Armour v. Brazeau,* 191 Ill. 117, 60 N. E. 904; *Texas & Pac. R. Co. v. Allen,* 114 Fed. 177, 52 C. C. A. 133. Notwithstanding the servant may rely upon the master discharging his duty to furnish safe tools and appliances and is not called upon to *inspect* them before using, still, if as a matter of fact ordinarily prudent and careful persons are used to glance at the implement with which they strike before striking a blow under the circumstances in this case, and the plaintiff neglected to do so, and such neglect contributed to cause the injury in question, he may well be found guilty of contributory negligence.

It is said that contributory negligence must proximately have contributed to produce the injury complained of, and

no act or omission is the proximate cause of an injury unless the person guilty of the act or omission ought in the exercise of ordinary diligence to have anticipated that an injury might result; that, not knowing of the defect in question, the plaintiff could not have anticipated injury; and that his omission to look at the implement before using it, even if a lack of ordinary care, was not such lack of ordinary care as had legal causal relation to the injury. This is ingenious, but unsound. Knowledge which may be acquired by the exercise of ordinary care is for the purposes of this rule knowledge possessed. For all that plaintiff knew or tried to know, the pick head might be loóse, or the handle might be broken, or he might have seized the wrong implement. It was not necessary that he should have anticipated the precise injury which occurred. If the act was careless and likely to result in some injury, that is sufficient. When the jury found the plaintiff lacking in ordinary care which contributed to the injury, they necessarily found that reaching for a tool or implement to its accustomed place, grasping it, swinging it up, and striking a blow with it without looking at the tool or implement was an act from which an ordinarily prudent person might anticipate some injury to himself. In other words, they found all the elements of fact which go to make up a case of contributory negligence. It could hardly be claimed that notwithstanding the duty of the master to furnish safe tools and appliances, and notwithstanding the right of the servant to presume that the master has performed his duty, the latter, although he may omit the more formal act of inspection, might also omit all usual and ordinary care.

2. The only facts found by the verdict relative to the negligence of the defendant were as follows: (1) The pick that plaintiff used at the time of the accident was in a defective condition; (2) such defective condition was the proximate cause of plaintiff's injury. We have seen that the

implement was one properly described as a simple tool. The verdict did not expressly find that the defendant knew or ought to have known of the defective condition of the pick, or any other fact or circumstance tending to show negligence on the part of the defendant, except that the tool at the time of the accident was in a defective condition and, by the second answer of the special verdict, that the defective condition of the pick was the proximate cause of plaintiff's injury. *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841; *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419; *Isaacson v. Wis. Tel. Co.* 138 Wis. 63, 119 N. W. 804. If the verdict be in this respect insufficient, the court below having rendered judgment for the defendant, it must be considered that the court determined upon the evidence that the defendant was not negligent. Sec. 2858*m*, Stats. (Laws of 1907, ch. 346); *Bates v. C., M. & St. P. R. Co., ante,* p. 235, 122 N. W. 745. But we do not decide that these two findings were sufficient or insufficient to convict the defendant of negligence. If we assume as most favorable to the appellant and for the purposes of this decision that they were so sufficient, that is all appellant can ask.

3. Error is assigned upon the following instruction to the jury relative to the third question of the special verdict:

"By 'ordinary care' is meant such care as the great mass of mankind ordinarily exercise under the same or similar circumstances, and if you find the pick was defective, and further find that plaintiff by the exercise of ordinary care could have examined it and observed its condition before using it, then you must find this question in the affirmative, or, if you find that he was otherwise guilty of any want of ordinary care that contributed to produce his injury, then you will answer the question in the affirmative."

The principal criticism submitted is upon the use of the word "could." Appellant contends that the words used at this place should have been "ought to." But what one could

in the exercise of ordinary care do to avoid injury, that he ought to do; and one ought to do what he could in the exercise of ordinary care do to avoid injury. The instruction was not erroneous. It does not require the plaintiff to do all he could do to avoid the injury, but to do all that he in the exercise of ordinary care could do.

4. The instructions relative to what is meant by a defective condition cannot be assigned as error by the appellant because the jury found in his favor upon that point.

5. Error is assigned on the admission of the evidence of Edgell and McDonald. The former, after testifying that he used the same coal pick in cracking coal from the time the plaintiff was hurt until the train reached its destination, was asked: "Did you find any difficulty in using it for that purpose?" and he answered, "Not a particle." "Did you find that it caused you any more danger to break coal with that pick than any other pick that you had used for a similar purpose?" and he answered, "No, sir." McDonald, another witness, testified that he used the pick on the run next day, and was asked, "Did you find in the use of that pick that it increased any hazard of splinters flying from other picks that you had used?" to which he answered, "I couldn't see any difference in it to other picks." This testimony related to the question whether or not the pick was defective, thereby causing splinters of coal to fly. As we have seen, this finding was in favor of the appellant; consequently the appellant was not prejudiced by the admission of the evidence. It is suggested, however, that this evidence has some bearing on the question of the contributory negligence of the plaintiff. We think not. The plaintiff's contributory negligence, if it existed, and it was found by the jury to exist, consisted in reaching for the pick, swinging it up and striking a blow with it without even a glance at the pick to ascertain its condition.

By the Court.—The judgment of the circuit court is affirmed.

MILLER, Respondent, vs. SOVEREIGN CAMP WOODMEN OF THE WORLD, Appellant.

October 7—October 26, 1909.

Trial: Questions for jury: Death: Presumption from absence: Residence: Evidence: Parent and child: Life insurance: Waiver of proofs of death.

1. On a jury trial where different minds might reasonably draw different conclusions from the evidence as to a fact in issue, the jury, rather than the court, should draw the inference.
2. Proof of diligent search and inquiry is not required to establish the presumption of death of a person who has been absent from his home or place of residence for seven years without being heard from.
3. Upon evidence that a son resided with his widowed mother until his majority and thereafter returned to her home frequently and made it his headquarters, and in the absence of any evidence that he acquired or intended to acquire a different home or place of residence, the trial court properly assumed that his residence was with his mother.
4. Refusal of a benefit association to recognize any claim based on the presumption of death resulting from absence was a waiver of its right to insist upon proofs of death as a condition precedent to an action on the benefit certificate.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The plaintiff, as the beneficiary in a benefit certificate issued to her son Otto Miller, brings this action to recover $1,000. To establish the death of the insured evidence was offered tending to show that at the time the action was begun he had been absent from his home and unheard of for seven years. No evidence was offered by the defendant. The court directed a verdict in favor of plaintiff, and such ruling is assigned as error.

Otto Miller was last heard from in 1899. He was then twenty-three years of age and unmarried. He was a musician and a barber and had pursued both callings for a livelihood, and had been away from home on and off for

several years prior to his disappearance. It appears that he was devoted to his mother, writing to her frequently when he was away, and returning to her home at irregular intervals. The testimony fairly shows that in so far as the alleged decedent had any home it was with his mother. In 1899 he was engaged to be married to a young lady at Monroe, where his mother resided. In July, 1899, the plaintiff and Otto went to Salina, Colorado, where *Mrs. Miller* visited some relatives until the following July. It is not entirely clear whether she went to Colorado with the purpose of making it her permanent home, but the inference from the testimony is strong that she did not. Otto did not remain at Salina long, but spent most of his time in Denver and Boulder until December, 1899, at which time he wrote his mother from Denver. Nothing further had been heard from him up to the time of the trial. Some rumors reached plaintiff as to his whereabouts, and numerous letters were written to parties who it was thought might be likely to know of him if he were alive. The plaintiff continued to make the required payments on the benefit certificate for the seven years after the disappearance of her son.

For the appellant there was a brief by *Jeffris, Mouat, Smith & Avery,* attorneys, and *Arthur H. Burnett,* of counsel, and oral argument by *M. O. Mouat.*

J. M. Becker, for the respondent.

Barnes, J. It is contended by the defendant that the evidence offered was insufficient to raise the presumption of death and that a verdict should have been directed in its favor. If this contention be not well taken, then it is urged that the jury should have been permitted to pass upon the principal issue in the case.

Some of the more modern cases hold that an interested party seeking to establish the death of another may not rely on the absence of such party from his home or place of

residence for seven years without being heard from as being sufficient to raise a presumption of death, but in addition thereto it must be shown that diligent search and inquiry have been made and all available sources of information exhausted without result before a *prima facie* case of death is established. *Modern Woodmen of America v. Gerdom,* 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. N. S. 809, and cases cited. If this rule is adopted by this court the judgment could not be sustained. While a considerable amount of evidence of search and inquiry was offered by plaintiff and was not contradicted, still different minds might reasonably draw different conclusions as to whether the search was sufficiently diligent, thorough, and exhaustive to meet the requirements of the rule. In such a case the jury rather than the court should draw the inference. The rule stated by Mr. Greenleaf is that:

"After the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved upon the other party. . . . It is sufficient, if it appears that he has been absent for seven years from the particular state of his residence, without having been heard from." 1 Greenl. Ev. § 41.

Other treatises on the law of evidence state the rule in substantially the same way. 4 Wigmore, Ev. § 2531; Jones, Ev. (2d ed.) § 61 (57). Each of the authors named cites an abundance of cases in support of the rule announced. In *Cowan v. Lindsay,* 30 Wis. 586, this court adopted, without qualification, the rule as laid down in Greenleaf on Evidence, and has reiterated such rule in *Whiteley v. Equitable L. Assur. Soc.* 72 Wis. 177, 39 N. W. 369, and in *Wis. T. Co. v. Wis. M. & F. Ins. Co. Bank,* 105 Wis. 464, 81 N. W. 642, although it was not necessary to the decision of either of the two cases last cited to do so. Thus it will be seen that the court is firmly committed to the general doctrine which does not require proof of diligent search and

inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years.

To hold in this case that the home of the plaintiff was not that of her son would be equivalent to holding that where a son has reached his majority, and has made it a practice to work away from home at times, he thereby loses his domicile with his parents, at least in the absence of direct evidence on his part of intention not to change his place of residence.

The plaintiff is a widow seventy-two years of age. She had six children. One died in 1898 and one in 1899, and three others died prior to 1898, so that Otto was the only living child and heir when his mother went to Colorado in July, 1899. Otto appears from the evidence to have been an affectionate son, returning often to the home of his mother, and writing her very frequently during his absence. The death of the plaintiff's daughter Emma in 1899 was the immediate cause of her going to Colorado. While there Otto made her numerous visits up to the time of his disappearance. There was nothing to suggest that he had acquired or intended to acquire a home or place of residence different from that of his mother. Intention is almost invariably a controlling element in determining residence. In Pennsylvania it is held that:

"Residence is, indeed, made up of fact and intention; that is, of abode with intention of remaining. But it is not broken by going to seek another abode; but continues until the fact and intention unite in another abode elsewhere." *Pfoutz v. Comford,* 36 Pa. St. 420, 422.

Other courts hold that a person leaving his place of residence with the present intention of abandoning it thereby ceases to be a resident of such place. *Swaney v. Hutchins,* 13 Neb. 266, 13 N. W. 282. But residence is not lost by leaving it for temporary purposes, where the intention remains to return when such purposes are accomplished.

Daubmann v. City Council, 39 N. J. Law, 57, 59; *Stratton v. Brigham,* 34 Tenn. 420, 422; *Warren v. Thomaston,* 43 Me. 406, 418. The general rule is that a man must have a habitation somewhere and that he can have but one, and that in order to lose one he must acquire another. *Kellogg v. Winnebago Co.* 42 Wis. 97, 107; *Bulkley v. Williamstown,* 3 Gray, 493, 495. Residence signifies a person's permanent home and principal establishment, to which whenever he is absent he has the intention of returning. *In re Clark's Estate,* 61 Hun, 619, 15 N. Y. Supp. 370, 371. Sec. 69, Stats. (1898), prescribes rules for determining the residence of electors. Subd. 3 of this section provides that a temporary absence from home with the intention of returning shall not deprive a party of his residence; and subd. 9 provides that intention to acquire a new residence without removal shall avail nothing, and that neither shall removal without intention. These statutory provisions would seem to be merely declaratory of the common law.

The residence of Otto Miller was with his mother, at least until he reached his majority, as he could form no valid intent to change it before. There is no proof that he acquired or attempted to acquire any new residence. There is abundant evidence that he did return to the home of his mother frequently, and at least made it his headquarters. Under these circumstances we do not think the court erred in assuming that the residence of the plaintiff was the residence of her son.

The certificate upon which suit was brought provided that no legal proceeding should be instituted to recover thereunder until ninety days after proofs of death were furnished. The constitution of the defendant required the officers of the local camp to report the death of a member to the sovereign clerk of the order, and made it the duty of such clerk to forward to the clerk of the local camp such blanks as should be prescribed by the sovereign commander and finance committee,

upon which to make proof satisfactory to them. A proper request for such blanks was made, and was refused on the ground that no notice of death had been received. In refusing to send the blanks an officer of the defendant, presumably duly authorized, stated that proof of absence could not be received as proof of death, and that the validity of the claim made could not be recognized unless actual death could be shown. The defendant, no doubt in conformity with the provisions of its constitution, had blanks upon which to make proofs of death that would be satisfactory to it. The plaintiff could hardly be expected to know what was required in this regard. There was a denial of liability if plaintiff proposed to rely on the presumption of death resulting from absence. Under these circumstances the defendant waived its right to insist on proofs of death as a condition precedent to the beginning of suit. *King v. Hekla F. Ins. Co.* 58 Wis. 508, 17 N. W. 297; *Faust v. Am. F. Ins. Co.* 91 Wis. 158, 64 N. W. 883; *Matthews v. Capital F. Ins. Co.* 115 Wis. 272, 91 N. W. 675.

By the Court.—Judgment affirmed.

MONROE TELEPHONE COMPANY, Appellant, vs. LUDLOW and others, Respondents.

October 7—October 26, 1909.

Telephone companies: Location of poles: Removal by city officers: Obstruction in streets.

1. Where a telephone company, operating under a city ordinance requiring it to locate its poles as directed by the council, paid no attention to a resolution of the council, served upon the company, directing removal of a pole set without previous authority, it cannot complain because the mayor and other officers carried out the directions of the council and removed the pole.

[2. Whether the mayor and aldermen were justified in summarily removing the pole as an obstruction in the public streets under secs. 1326, 1347, Stats. (1898), not determined.]

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

J. L. Sherron, for the appellant.

For the respondents there was a brief by *A. S. Douglas,* attorney, and *Aylward, Davies & Olbrich,* of counsel, and oral argument by *Mr. Douglas* and *Mr. M. B. Olbrich.*

WINSLOW, C. J. This action was brought to recover damages for the wrongful removal of a telephone pole standing in the street in the city of Monroe, which is a city of the fourth class. The action was tried before the court, trial by jury having been waived. The plaintiff was operating its system in said city under an ordinance providing that the location and setting of all poles should be under the direction of the common council. It set the pole in question, without previous authority from the council, in one of the streets of the city, near its intersection with an alley, and in the traveled track, so as to materially obstruct free access to and from the alley. The city council by resolution directed the removal of the pole and served a copy of the resolution on the plaintiff company. No attention was paid to the resolution, and about twenty days thereafter the defendant *Ludlow,* who is the mayor of the city, aided by the street committee of the council and an experienced lineman, removed the pole, being careful to do no unnecessary damage.

The facts stated show that there can be no recovery. The company was required under the ordinance, which it had accepted and was acting under, to locate its poles as directed by the council. When directed to remove the pole in question it was plainly its duty to do so, and it cannot complain because the mayor, who is the chief executive officer of the city and charged with the duty of enforcing the state laws and city ordinances (sec. 925—38, Stats. 1898), carried out the directions of the council. This conclusion seems incontestable.

It may well be, also, that the mayor and aldermen were justified in removing such an obstruction in the public streets summarily under the provisions of secs. 1326 and 1347, Stats. 1898 (*State v. Leaver*, 62 Wis. 387, 22 N. W. 576); but, as the other ground of defense is complete, it is unnecessary to decide this question.

By the Court.—Judgment affirmed.

In re Plowright.

October 8—October 26, 1909.

Street and electric railways: Condemnation of streets: Delay: Proceedings by landowner: Limitation.

1. A corporation having a franchise from the state to operate a street railway for carrying passengers in the city, and no authority to operate an interurban railway on the streets, had no right to condemn the use of the street for interurban railway business; and until it acquired such right the period of limitation under sec. 4222, Stats. (1898), barring proceedings by a landowner under sec. 1852, did not begin to run.
2. Delay of an interurban railway company for more than four months after acquiring the right to institute proceedings for condemnation of a street is *held*, under the facts of this case, to warrant a landowner in proceeding in the matter under sec. 1852, Stats. (1898).

Appeal from an order of the circuit court for Rock county: George Grimm, Circuit Judge. *Affirmed.*

The *Beloit, Delavan Lake & Janesville Railway Company* was incorporated March 4, 1901. The articles of incorporation state that the purpose of the corporation shall be "to build, construct, operate, maintain, purchase, lease, and acquire a railway or railways for the carrying of persons and property, including mail, express matter, baggage, freight, or any thereof, and the furnishing of light, heat, and power."

The location of the corporation is given in the articles as Beloit, Rock county, Wisconsin. By an amendment on August 21, 1901, the purpose in forming the corporation is given as follows:

"For the business and purpose of purchasing or otherwise acquiring, constructing, equipping, leasing, maintaining, and operating by electricity or other power, a street railway for the transportation of passengers in the city of Beloit, county of Rock, state of Wisconsin, and elsewhere as it may by law be authorized to do, and of purchasing or otherwise acquiring, taking, holding, and operating real and personal property, rights, privileges, ordinances, and franchises and any enterprises suitable for or in furtherance of the business or purposes of the corporation, and for the purpose of acquiring by purchase, lease, or by right of eminent domain, the real and personal property, rights, privileges, ordinances, and franchises of any individual or individuals or of any street railway, electric power, light, or heat companies, foreign or domestic, now or hereafter existing, or of leasing the same, or of acquiring and holding the shares, bonds, or other securities of such street railway or light, power, or heat companies or interests therein, and of extending its railways to any point or points within any town adjoining said municipal corporation, and of acquiring, building, maintaining, operating, and using any street railways for the transportation of passengers or for the transportation of mail, express, merchandise, and freight, or of both or all, in any city, village, or town, and to extend its railway or railways from any point in one city, village, or town, to, into, and through any other city, village, or town; and of manufacturing, generating, storing, or using, selling, and leasing electricity for power, light, or other purposes."

The nature of the business and the railway company's powers, rights, privileges, and franchises are set out in the report of its case against Macloon (136 Wis. 218, 116 N. W. 897), to which reference is made for further details.

On May 13, 1901, the common council of the city of Janesville passed an ordinance, over the mayor's veto, grant-

ing the defendant corporation a franchise in and upon certain streets of the city, among others a part of Franklin street, to construct, maintain, and operate an electric railway for the carriage of passengers. A year later the ordinance was amended by changing its route. In April or May, 1902, the defendant corporation commenced to lay its tracks upon Franklin street, and by July this work of construction had been completed. Meanwhile the defendant had undertaken the work of constructing a line of track in extension of the line in the city of Janesville and to the city of Beloit, and in December, 1902, began the operation of an electric interurban railway in and from the city of Janesville to and through the city of Beloit. By an ordinance of January 7, 1907, the city of Janesville granted the defendant a franchise to carry express, package freight, and mail in addition to passengers, and soon afterward the defendant commenced the carriage of the articles enumerated in the franchise over its whole line. By an ordinance of the common council of Janesville dated July 20, 1908, the defendant was granted a franchise to maintain and operate an urban and an interurban electric railway for the carriage of passengers, express, package freight, and the United States mail in, between, and through the city of Janesville and the city of Beloit over the streets named in the ordinances previously passed, which granted the defendant franchises to do the business therein enumerated. Since December, 1902, the defendant has operated a city street railway business in the city of Janesville, using the same cars as were used in the interurban business. Since January, 1907, the defendant has carried express, package freight, and United States mail in the city of Janesville in the cars used in the Janesville urban and its interurban business.

The petitioner instituted these proceedings on November 30, 1908, praying for the appointment of commissioners to appraise his damages caused by the taking and operation

by the defendant of its railway system over a portion of his real estate, to wit, that part of Franklin street, a public highway, occupied by the defendant on the east end of his lot. The defendant answered, alleging that it had taken possession of the strip of plaintiff's property in April or May, 1902, and pleaded the statute of limitations, alleging that more than six years had elapsed since the taking of the strip for interurban railway business purposes and that petitioner was barred from instituting this proceeding. On February 11, 1909, the circuit court filed a determination holding that the plaintiff was not barred by the statute of limitations, and on March 10, 1909, the court filed an order appointing commissioners to ascertain and appraise petitioner's damages. This is an appeal from such order.

The cause was submitted for the appellant on the brief of *Thos. S. Nolan,* and for the respondent on that of *Charles E. Pierce.*

SIEBECKER, J. The right of any street or interurban railway company to condemn the right to use city or village streets, alleys, or viaducts was not given by law until the adoption of ch. 465, Laws of 1901 (sec. 1863*a*, Stats.), which grants the right upon the express condition that ". . . the use of such street, alley, or viaduct shall first be granted to such street or electric railway company by a franchise duly passed by the board of trustees or common council of such village or city." The decision in the case of *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 116 N. W. 897, determined that appellant had no right as an interurban railway to institute condemnation proceedings for the use of a street unless it first had obtained a grant from the common council of the city authorizing such use of the street. The inquiry therefore in the case is: When did the appellant obtain the right to condemn the use of the street for an interurban railway business?

Prior to 1907, under the franchises it had obtained from the city of Janesville, it was given authority to operate a street railway for the transportation of passengers in the city. The conduct of this business, as held in the *Macloon Case,* required no condemnation of the use of the street, and hence no right to condemn existed either against or in favor of respondent. It is obvious from the context of the ordinances passed prior to 1907, which granted the appellant the right to operate its railway business over the city streets, that appellant was authorized merely to conduct a street railway business, and that no authority to conduct an interurban railway business was conferred thereby. Such authority was unquestionably conferred by the ordinance of July 20, 1908. Whether the ordinance of January 7, 1907, conferred such authority it is not necessary to decide. If authority to do an interurban railway business is thereby conferred, still the period of limitation barring actions for condemnation under sec. 4222, Stats. (1898), has not run. Under the circumstances the right to condemn did not exist prior to the passage of these ordinances and no right to proceed to condemn could have accrued. Of course, petitioner had no power to proceed under sec. 1852, Stats. (1898), until the railway company had delayed or omitted to institute and conduct the proceedings to a conclusion. Under the facts we deem appellant's delay in instituting the proceeding to condemn since the right accrued was sufficient to warrant petitioner's proceeding in the matter.

The order appointing commissioners to appraise petitioner's damages was proper.

By the Court.—The order is affirmed.

STATE BANK OF REESEVILLE, Appellant, vs. KIENBERGER and others, Respondents.

October 8—October 26, 1909.

School districts: Officers: Contracts: Individual liability for supplies purchased: Illegally issued school order.

1. In an action upon an agreement by which defendants bound themselves individually and as school district officers to pay for certain goods in cash or a legally issued school warrant, plaintiff cannot recover from the defendants individually without showing that the school warrant which was in fact issued as payment was illegally issued.
2. A school warrant or order issued by the proper officers of a school district will be presumed to be a legal order until the contrary is shown.
3. Where a purchase of school supplies was never authorized or approved at a meeting of the district board, as required by secs. 432, 436, Stats. (1898), and a school warrant or order issued in payment therefor was not authorized or ratified at a board meeting but was signed by the members of the board independently and not in the presence of each other, such warrant was not legally issued.

APPEAL from a judgment of the circuit court for Dodge county: GEORGE GRIMM, Judge. *Reversed.*

This action was brought by plaintiff as assignee of the Agricultural Educational Society, a foreign corporation, to recover the amount agreed to be paid under the following contract:

"This order is not valid unless signed by the majority of the Board.

"*To the Agricultural Educational Society,*

"356 Dearborn St., Chicago, Ill.

"GENTLEMEN: Please ship, prepaid, freight one set of Country Life and Agricultural Education to *Mr. Theo. Kienberger* at Beaver Dam, county of Dodge, State of Wis. for School District No. 8, Township of Calamus, County of Dodge, State of Wis., for which we agree to pay forty-seven dollars and fifty cents per set, making a total sum of forty-

seven and 50-100 dollars; the same to be paid in cash or legally issued school warrant. If warrant is issued, to be paid Oct. 1st, 1905.

"The Agricultural Educational Society hereby guarantees that the goods shall be in good condition upon delivery, or purchaser shall not be obliged to accept the same.

"We, the undersigned, individually and as school officers, agree to take the goods from the freight office on their arrival and pay for the same as above stated, and that no verbal agreement shall in any way change this order.

"Date Aug. 8th, 1905.

"Post office: Columbus, No. 2.

"Theo. Kienberger.
"A. Zarwell.
"John Braker."

The complaint alleges the making of the contract, also the making of the school order to the Agricultural Educational Society for the sum of $47.50, the alleged purchase price, and that said order was signed by the clerk, director, and treasurer of the district, and was due and payable October 1, 1905; that after the making and delivery the contract, together with the order, was assigned to the plaintiff, and the order presented for payment and not paid; that plaintiff also demanded of the defendants individually the payment of the amount due on contract, and that there is due from the defendants by reason of the contract $47.50 with interest from October 1, 1905; that plaintiff elects to hold the defendants individually on the contract.

The case was first tried in justice's court, and upon appeal to the circuit court the answer was amended so as to set up a general denial, and setting up, among other things, that at the time of signing the order the defendants constituted the school board of district No. 8, town of Calamus, Dodge county, Wisconsin, one being the clerk, another director, and the third treasurer, and that there was no meeting of the school board held for the purchase of any books, and that the order in question was not signed in the presence of the board

jointly, nor was the same ever ratified in any way at any meeting of the board, nor was the order ever recognized as a valid order against the district, and that the defendants as individuals never received any consideration for signing the order, and that the same was void and of no effect. Payment was demanded before action brought.

The case was tried by the court, and the following findings of fact and conclusions of law made: That the plaintiff is a corporation duly incorporated and existing under the laws of the state of Wisconsin; that the defendants at and prior to the time of the commencement of this action were the officers of school district No. 8 in the township of Calamus, Dodge county, Wisconsin; that on or about the 8th day of August, 1905, the defendants individually and as such school officers entered into an agreement in writing with the Agricultural Educational Society, a foreign corporation, for the purchase of a set of books and charts designated as "One set of Country Life and Agricultural Education," by the terms of which agreement they bound themselves individually and as such school officers to receive said goods on arrival and pay for the same the sum of $47.50 either in cash or by a legally issued school warrant payable October 1, 1905; that at the same time the defendants as such school officers duly executed to said Agricultural Educational Society an order upon the treasurer of said school district for the payment of said sum of $47.50, and delivered the same to said society pursuant to the terms of said contract; that on or about the 14th day of August, 1905, plaintiff for value became and now is the owner of said agreement and school order; and that it brings this action to recover from the defendants individually the sum of $47.50 upon said agreement. And as conclusion of law that the defendants are entitled to judgment dismissing said action with costs.

Judgment was rendered for the defendants, from which this appeal was taken.

For the appellant there were briefs by *Kading & Kading,* and oral argument by *C. A. Kading.*

For the respondents there was a brief by *Malone & Miller,* and oral argument by *J. E. Malone.*

Kerwin, J. The complaint in this case seems to be grounded upon the right to recover because of nonpayment of the order and the right on the part of the plaintiff to elect to hold the defendants individually liable. There is no allegation in the complaint that the order was illegally issued, but there is an allegation, as we have seen, that the order was made, executed, and delivered to the Agricultural Educational Society on *John Braker* as treasurer of the school district in the sum of $47.50 for value, and signed by the clerk, director, and treasurer. It is quite clear from the contract that it was necessary for plaintiff to show, in order to recover, that the order issued was an illegal order or illegally issued, because, an order having been issued as alleged by the proper officers of the school district, it must be presumed to be a legal order until the contrary is shown. But the theory of the defendants seems to have been, as well by the allegations of their answer as by the proof, that the order was illegally issued, and they set up facts in their answer showing that the order was illegally issued, and the evidence in the case supports these allegations. The answer sets forth, as before stated, that there was no meeting of the school board held for the purchase of any school books and that said order was not signed in the presence of the board jointly. The evidence sustains these allegations and shows that the board never met as a board and never voted to purchase the books or execute the order, but it appears that the order was signed by the members of the board independently and not in the presence of each other. So we think it is established conclusively, not only by the allegations of the answer but by the proof, that the alleged order was not legally issued,

therefore not binding upon the district. Sec. 432, Stats. (1898), provides that no act authorized to be done by the school board shall be valid unless voted at its meeting, and sec. 436, Stats. (1898), provides that purchases of school supplies must be approved at a regular meeting of the board at which all members are present. The evidence establishes conclusively that these provisions of the statute were not complied with, therefore the order was illegally issued. This being so the plaintiff had a cause of action against the defendants individually under the contract, which provides that the set of "Country Life and Agricultural Education" mentioned in the contract must be paid for in cash or by a legally issued school warrant payable October 1, 1905, and it appearing no warrant was legally issued the defendants became individually liable under the contract. It follows, therefore, that upon the undisputed facts the plaintiff is entitled to recover.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to enter judgment for the plaintiff.

STARK, Appellant, vs. DUHRING and another, Respondents.

October 8—October 26, 1909.

Appeal: Assignments of error: Immaterial errors: Evidence: pleading: Counterclaim: Waiver of objections: Boundaries: Adverse possession.

1. Assignments of error that the court erred in the admission of evidence, in the rejection of evidence, in its findings of fact, in conclusions of law, and in not finding that defendants committed the trespass alleged in the complaint, are inadequate because too general.
2. Upon a trial by the court, errors in the admission of evidence are not material if the findings are supported by other evidence properly admitted.

3. The objection that certain counterclaims could not properly be pleaded in the action was waived by failure to demur or reply to them.
4. In an action involving the location of a boundary line, evidence of adverse possession is admissible as tending to show the true location of the disputed line.

Appeal from a judgment of the circuit court for Dodge county: George Grimm, Judge. *Affirmed.*

J. E. Malone, for the appellant.

For the respondents there was a brief by *Kading & Kading,* and oral argument by *C. A. Kading.*

Timlin, J. This action for trespass *quare clausum* committed November 24, 1906, on the southwest quarter of the northeast quarter of section 21, town 9, range 16 east, was brought in justice's court. The defendants answered separately, each claiming that the acts complained of as trespasses were done on the northwest quarter of the southeast quarter of the same section, which was the land of the defendant *William Duhring, Jr.,* and not upon plaintiff's land, and *William Duhring, Jr.,* by way of counterclaim averred trespasses committed by the plaintiff on the last-mentioned land on October 17, 1905, and at other times, and prayed for damages against the plaintiff. Claim was made that the title of the land was in question, a bond given, and the cause certified to the county court of Dodge county, and thence removed by stipulation to the circuit court for the same county, where a jury trial was apparently waived and the cause tried. There was no demurrer or reply to the counterclaims, but the parties went to trial on the merits and treated the counterclaims as at issue. Findings of fact and conclusions of law were made and filed in which the court found, in substance, that the case was one of disputed boundary and the true boundary was as claimed by defendants. and consequently that the defendants did not trespass on plaintiff's land, but plaintiff trespassed on defendants' land.

Error is assigned (1) in the admission of evidence; (2) in the rejection of evidence; (3) "the court erred in its findings of fact found;" (4) in conclusions of law; (5) in not finding that defendants committed the trespass set forth in the complaint. These are very inadequate assignments of error because too general; the third and fourth going in very general terms to the whole merits of the controversy. They do not help more to point out the error complained of than if the appellant merely said: "The judgment is wrong." Appellant evidently does not rely very seriously upon the first two assignments of error, for, besides referring to the page of the printed case where found, he merely says: "We contend that the motion to strike out testimony of *William Duhring, Jr.*, should have been granted; . . . also that objections to admission of testimony on the same page should be sustained; also the same on page 27." No further argument and no citation of authority. The case having been tried without a jury and there being other evidence to support the findings, appellant was not prejudiced by any such ruling. *Wolf v. Theresa Village Mut. F. Ins. Co.* 115 Wis. 402, 91 N. W. 1014. Under some or all of the foregoing assignments of error the appellant presents that no such counterclaims could be properly pleaded in this action, and this constitutes the principal argument on appeal. But this objection, if it could be considered good, is waived by failure to raise it by demurrer or reply to the counterclaim. Secs. 2658, 2660, Stats. (1898). On the merits we think the case presented questions of fact relative to the true location of the disputed boundary. There is evidence to support the findings.

The evidence which appellant objects to as proof of adverse possession is not considered by the court for any other purpose than to establish, or tend to establish, the true location of the disputed boundary line. No other use is made of it, for the court finds that this land was not a part of

plaintiff's subdivision, but lay to the south of such subdivision and was part of the subdivision owned by *Duhring, Jr.* The latter did not need any adverse possession to hold his own land against the plaintiff, and the question of adverse possession is not in the case at all except so far as it constitutes an item of evidence tending to show the true location of the boundary line. We perceive no error in anything complained of by appellant.

By the Court.—The judgment of the circuit court is affirmed.

STATE EX REL. JONES, Appellant, vs. BURKE, Mayor, and others, Respondents.

October 8—October 26, 1909.

Statutes: Construction: Schools: Fixing amount to be raised: Powers of school boards: General charter law.

1. Where it is sought to show that the provisions of the general charter law relating to schools do not apply to a city adopting that law in its entirety, and that the provisions of a special charter do apply, the language relied on to express such intent should be reasonably plain, and it should not be extended by implication or by doubtful construction so as to vest important powers in different bodies in cities operating under a general law.
2. Under the special charter of the city of Beaver Dam the power to determine the amount of school moneys to be raised was vested in an elective school board. The city adopted the general charter law, under sec. 925—113 of which "the election and organization, powers and duties" of the board were not affected. That section was subsequently repealed and a new section enacted, providing that where there was an elective board "the plan of school organization and management" should continue until changed by vote of the electors. *Held*, that the power to determine the amount of school moneys to be raised was not a part of "the plan of school organization and management," and that after the enactment of the new section (sec. 925—113, Stats.: Laws of 1907, ch. 480) that power was in the common council, being vested in that body by other provisions of the general charter law.

APPEAL from orders of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Order quashing alternative writ affirmed; appeal dismissed as to other orders.*

This is an appeal from parts of three alleged orders. One of such orders quashes an alternative writ of *mandamus* sued out to compel the mayor and common council of the city of Beaver Dam to levy the amount of school taxes certified by the school board to the city council for the year 1908.

For the appellant there were briefs by *George B. Swan,* attorney, and *C. M. Davison,* of counsel, and oral argument by *Mr. Swan.*

John C. Healy, as city attorney, and *M. E. Burke,* of counsel, for the respondents.

BARNES, J. Under the special charter of the city of Beaver Dam, as amended by ch. 96, P. & L. Laws of 1859, the power was vested in the school board to determine and certify to the common council by July 1st in each year the amount of money necessary to support the schools of the city for the ensuing year, and it was made incumbent on the common council to levy the amount so certified for school purposes. *State ex rel. Ordway v. Smith,* 11 Wis. 65. The power of the school board was materially curtailed by sec. 4, subch. X, ch. 83, Laws of 1885; but we may assume for the purposes of this case that ch. 135, Laws of 1889, substantially restored to it the powers conferred by the law of 1859, and imposed upon the common council the duties in regard to making levies for school purposes that were imposed by such act, and we take it as granted that prior to the adoption of the general charter law in its entirety by the city of Beaver Dam in 1903 the common council of such city had no voice in determining the amount of money that should be levied for school purposes, provided the school board performed its statutory duty to determine and certify the amount that should be raised.

Sec. 925—113 of the general charter law, as it stood when adopted by the city of Beaver Dam in 1903, provided:

"In every city which shall adopt this chapter for its government, if there shall be at the time of such adoption a board of education or school board elected by the people under the provisions of its charter, . . . the election and organization, powers and duties of such board shall not be affected by this chapter, and such system shall continue until changed by a vote of the electors of the city."

The school board of Beaver Dam is an elective one, and it is one of the contentions of the appellant that the provisions in the general charter law above referred to retained in and reserved to such school board all the rights and powers it possessed under the special charter of the city, including the right to compel the city council to levy such sums for school purposes as were determined upon by the school board and certified by it to the common council.

By ch. 480, Laws of 1907, sec. 925—113, Stats. (1898), was repealed and a new section was adopted in lieu thereof. This act provided that as to cities other than those of the first class adopting the general charter law, when the school board was elective at the time of such adoption, "the plan of school organization and management shall continue until changed by a majority vote of the electors of such district." This amendment was in force at the time the common council of Beaver Dam refused to levy the amount of money for school purposes determined and certified by the school board.

We deem it unnecessary to decide whether the general charter law at the time it was adopted by the city of Beaver Dam gave the school board of the city the right to determine the amount of school taxes that should be raised in a given year and the right to compel the city council to levy the amount so determined. If such right was retained in the school board it was because such law authorized it to exercise the *"powers* and *duties"* theretofore exercised under the

special charter. The law of 1907 made a radical change in the verbiage and we think in the meaning of sec. 925—113. The right to exercise the powers and duties conferred by the old charter was no longer preserved to the school board. Instead, the "plan of school organization and management" was continued as it existed under the special charter. We are unable to see how the making up of the school budget, coupled with the right to compel a levy of the amount stated therein, is any part of the plan of school organization or school management. It is certainly no part of the organization, and it seems plain that it is no part of the management as that term is ordinarily used and understood. The purpose of enacting the general charter law was to secure uniformity in city government and in the method of running the various departments thereof. Where it is sought to show that the provisions of the general law relating to schools do not apply to a city adopting the law in its entirety, and that the provisions of a special charter do apply, the language relied on to express such intent should be reasonably plain, and it should not be extended by implication or by doubtful construction so as to vest important powers in different bodies in cities operating under a general law. The legislature must have had some purpose in mind in making the change which it did make in this statute, and to hold that because the "plan of organization and management" of the schools of this city should remain unchanged the common council was divested of the power to determine the amount of school moneys that should be raised, which power is otherwise plainly conferred on the common council by the general law, would, we think, be unwarranted.

By the Court.—The order quashing the alternative writ of *mandamus* is affirmed. As to the other alleged orders appealed from in part, the appeal is dismissed.

STUMM, Respondent, vs. WESTERN UNION TELEGRAPH COMPANY, Appellant.

October 8—October 26, 1909.

Telegraphs: Negligence: Nondelivery of message: Loss of contract: Damages: Future profits: Instructions to jury: Proximate cause: Appeal: Assignments of error: Evidence: Letters: Copies.

1. Damages for loss of profits from a prospective contract of employment which was not secured because of defendant's negligent failure to deliver a telegram apprising plaintiff of the opportunity to close such contract, are not too speculative to be recovered.
2. In an action for damages for wrongful conduct preventing plaintiff from obtaining employment the reasonable value the contract would have netted to him had the breach of duty not occurred is the measure of damages, provided the evidence presents a fair basis for determining such value with reasonable certainty.
3. In an action against a telegraph company for damages caused by failure to deliver a telegram, an instruction that, in order to find that plaintiff lost a contract of employment by such nondelivery, the jury must be satisfied that the person sending the telegram had authority from the alleged employer to make such contract, did not invade the province of the jury and was not erroneous, there being evidence of such authority.
4. An instruction giving correctly the definition of proximate cause in the abstract was not erroneous because not phrased to fit the particular facts of the case, where no different or further instruction was requested.
5. Assignments of error on the admission of evidence will not be considered where the particular portions claimed to have been improperly admitted are not pointed out and the pages of the printed case referred to generally do not contain the evidence claimed to be incompetent.
6. A letter on one of the regular letterheads used by the alleged writers, which the addressee testified was received directly from them, was properly admitted in evidence though marked "copy" and signed with a stamp instead of in writing.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to recover compensation for damages claimed to

have been caused by negligence in failing to send and deliver a telegram.

Plaintiff applied by letter for employment as a second miller in a mill in Venezuela. He addressed the letter to a firm in New York in response to an advertisement inviting applications for the place. In due time he received an answer, through Allis-Chalmers Company of Milwaukee; stating that they were empowered in the matter and stating such things as he would likely wish to know before engaging, requesting a reply as to his experience, and informing him that, if they should engage him, a visit to them before going to take the place would be required. In due time he returned a satisfactory reply. Thereupon they wrote again, specifying the wages offered, stating that expenses both ways would be paid, and that, if the terms were satisfactory, they would probably have him come to Milwaukee to arrange details. Plaintiff responded accepting the terms. He soon thereafter wrote again. Two days later they telegraphed him to come to Milwaukee to make a contract. The message was duly received by defendant at its main office in Milwaukee and put on the wire. It went first to the Chicago office, then to the St. Louis office, where it was delivered to a sixteen-year-old female operator for transmission to the point of destination, Staunton, Illinois. It did not reach there or plaintiff. About three weeks thereafter plaintiff gave up the position he had, supposing he was going to obtain the place for which he had applied, and went to Milwaukee to see about it. The Allis-Chalmers Company, not hearing from plaintiff, had entered into negotiations with another man in respect to the matter, whom they employed. Plaintiff stood ready to take the place on the terms that had been stated to him, but was unable to secure it for the reason indicated. They waited some two weeks to hear from plaintiff before entering into negotiations with the other man for the place. The employment of such other was ratified by the principals in New York. Plaintiff

had been out of employment, at the time of the trial, some nine months.

Defendant's explanation, in respect to failure to send and deliver the telegram, was that it occurred by reason of strike disturbances and interferences which ordinary care on its part under the circumstances could not have prevented; that after some delay the operator at St. Louis got a response to the call for the Staunton office, whereupon the message was put upon the wire and its receipt, as appeared, was duly signaled back.

There was a motion for a directed verdict in defendant's favor. After the verdict various motions were made on behalf of defendant and denied, which will be referred to in the opinion so far as necessary. The jury found specially that the message was delivered to defendant to be sent plaintiff under the circumstances before detailed; that plaintiff failed to obtain the situation he applied for because of negligent failure of defendant to transmit to him and deliver such message; that the failure was not solely due to strike disturbance and that plaintiff was damaged by defendant's neglect in the sum of $800. Judgment accordingly was rendered in plaintiff's favor.

For the appellant there was a brief by *Miller, Mack & Fairchild,* attorneys, and *Tullar & Lockney* and *George H. Fearons,* of counsel, and oral argument by *A. W. Fairchild.*

James D. Shaw and *Oscar W. Kreutzer,* for the respondent.

Marshall, J. The court is of the opinion that the judgment must be affirmed.

The questions raised are of such nature that it is not thought best to write any extended opinion in respect to them.

The damages claimed are not fatally speculative. The question on that subject is ruled in respondent's favor by *Barker v. W. U. Tel. Co.* 134 Wis. 147, 114 N. W. 439, and similar authorities.

There was sufficient evidence to carry the case to the jury as to each inquiry in the special verdict. It seems needless to review the record and point out that which was competent as to each particular subject and the reasonable inferences therefrom. If the jury were warranted, in any reasonable view of the case as it was submitted to them, in reaching the conclusions embodied in the special verdict, that ends the matter as regards the facts.

It is contended that the court should have charged the jury, as requested, that respondent was not entitled to recover, in any event, on account of wages which he would have earned after May 20, 1908 (which is about the date of the trial), had the telegram been delivered and he had secured the employment to which it related. Counsel in that is misled by the law in respect to recovery on an employment contract in case of a wrongful refusal of the employer to carry out the agreement. Then wages lost are only recoverable up to the time of the trial. This is not such a case. It is an ordinary action for damages for wrongful conduct preventing respondent from obtaining employment. In such a case the reasonable value the contract would have netted to the person injured had the breach of duty not occurred is the measure of damages. It is within the rule for the recovery of future gains prevented so far as a fairly reasonable basis can be found for determining them with reasonable certainty, found in *Salvo v. Duncan,* 49 Wis. 151, 4 N. W. 1074; *Treat v. Hiles,* 81 Wis. 280, 50 N. W. 896; *Forster, W. Co. v. F. MacKinnon Mfg. Co.* 130 Wis. 281, 291, 110 N. W. 226; *Richey v. Union Cent. L. Ins. Co., ante,* p. 486, 122 N. W. 1030. The rule was applied in *Barker v. W. U. Tel. Co.* 134 Wis. 147, 114 N. W. 439.

Error is assigned because the court charged the jury:

"And in order that you may" find that plaintiff lost the situation in question by reason of nondelivery of the telegram, "you must be satisfied and convinced by a preponder-

ance of the evidence that Allis-Chalmers Company had authority from De Sola Bros. and Pardo to enter into a contract of employment for them with the plaintiff."

It is argued that the instruction involved a suggestion that it was competent for the jury to so find from the evidence, whereas there was no evidence of authority on the question. The mere submission of the question to the jury without any instruction whatever would have involved a suggestion that there was room in the evidence for a finding either way. Upon no other theory was there a jury question on the subject. To merely say what was said to the jury did not invade their province in the slightest degree. Counsel is wrong in the claim that there was no evidence on the question. The fact that the letter written by respondent was answered through Allis-Chalmers Company suggested, quite strongly, that it was authorized to arrange for a person to fill the situation. The further fact that the company did so and their action was ratified by the New York parties who advertised, inviting applications for the situation, was almost if not conclusive evidence of authority. On the whole there was ample to go to the jury in respect to the matter.

Other objections to the trial court's instructions are suggested, predicated on the theory of want of evidence to send the questions to which such instructions relate to the jury. We will not discuss them in detail. They are all sufficiently answered by what has been said.

Exception is taken to the court's definition of proximate cause. Such exception is without merit. The language used informed the jury of what proximate cause is in the abstract and they doubtless took it that way. It was copied substantially *verbatim* from *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735, which has been approved by this court in decisions found in every volume of our reports for the past twelve years. As has often been said, what constitutes proximate cause in the law of negligence is one thing;

what constitutes the proximate cause in the given case is another. The former is matter of law for the court; the latter is matter of fact for the jury to find under proper instructions, which it is obligatory for the court to give when suitably requested and which, generally speaking, ought to be given whether requested or not, where the subject is involved, but may be omitted without commission of harmful error, if error at all, in case a proper request is not made. The court here gave correctly the definition of proximate cause. True, it were better if it had been phrased to fit the particular facts of this case, but no request was made for any different or further instruction.

Several other exceptions to the trial court's instructions are urged upon our attention and all have received consideration. It is considered that such exceptions do not merit discussion in detail. We are unable to discover fatal error in any of them, or anything worthy of criticism or extended notice.

Error is assigned because the court permitted the evidence to be introduced of one Harrison, who acted for Allis-Chalmers Company in hiring a miller for the Venezuela parties after failing to secure the services of respondent. The particular portions of the evidence claimed to have been improperly admitted are not pointed out. Pages 33 and 34 of the printed case are referred to generally, which we do not find to contain evidence given by Harrison. It contains evidence given by one Hoppin. The assignment of error is presented in such a way that it cannot be considered. Probably, in any event, the evidence counsel had in mind was either proper or not harmfully improper, since the fact appears, by competent evidence, that the Allis-Chalmers Company in fact did secure a miller for the Venezuela mill, and he was accepted. That was the material circumstance going to show authority of the company and probability that respondent through it would have obtained the place but for the negligence complained of.

Error is assigned because the court admitted in evidence

what purported to be a copy of a letter written from New York by the principals in employing the miller to Mr. Harrison of the Allis-Chalmers Company, at Milwaukee, thanking the company for friendly assistance in securing one. The copy was on one of the regular letterheads used by the New York parties and the addressee testified that it was received directly from them. Under those circumstances it seems the paper, though marked "Copy" and though signed with a stamp instead of in writing, was competent as a circumstance bearing on whether the Allis-Chalmers Company was authorized to act in securing a miller for the Venezuela mill.

Some other rulings on the admission and rejection of evidence are discussed by counsel, which do not seem to have harmfully affected the appellant in any reasonable view of the case.

By the Court.—Judgment affirmed.

J. I. Case Threshing Machine Company, Appellant, vs. Johnson, Respondent.

October 9—October 26, 1909.

Sales: Breach of warranty: Rescission: Return of goods: Waiver: Authority of agent.

1. A vendor by expressly refusing to receive back a machine after breach of warranty, as provided by the contract of sale, waives the return thereof to the place where received as a condition of rescission.
2. The evidence in this case as to the scope of the authority of a general agent of the vendor is *held* to sustain a finding that his act in refusing to receive back a machine was the act of the vendor, although the written contract of sale provided that no person had authority to waive, alter, or enlarge the contract.
3. Use of a machine by vendee by way of reasonable test only is no obstacle to a subsequent rescission of the contract of sale.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action on two promissory notes given by defendant for a corn husker and shredder manufactured by the plaintiff under an order containing a warranty as to quality and efficacy, but conditioned that, in case of failure to comply with the warranty, the plaintiff should have opportunity to supply any defective parts and to make all reasonable efforts to remedy the difficulty, the buyer to render necessary and friendly assistance, and, if then it cannot be made to fill the warranty, the part that fails to work should be returned by the purchaser free of charge to the place where received and the company notified thereof, and, at the seller's option, another substituted therefor that shall fill the warranty, or the notes and money paid should be returned and the contract rescinded and no further claim made. The defendant upon trial was unable to make the machine do as good work as guaranteed; one of the serious difficulties being the tendency of parts to work loose in course of the use of the machine. Two or three attempts to make it satisfactory were made with the claim on part of plaintiff's representatives that the result had been accomplished, and insistence on the part of defendant that even the degree of efficiency which had been accomplished by the experts disappeared with a very brief operation of the machine. Finally, after being quite thoroughly convinced that the machine was not up to warranty, defendant was induced by the general agent of the company to permit one more effort on plaintiff's part to make it satisfy the warranty, and accordingly an expert was sent and worked over and with the machine a day or two, until Saturday the 24th day of November, when the expert went away, claiming that the machine worked satisfactorily. It was then set up and in process of a job for one Cook. An attempt was made to work the machine Saturday afternoon, and again through the forenoon of Monday, although defendant asserts that he was not satis-

fied that it would work according to the warranty when the expert left at noon of Saturday. At noon Monday all attempt to use the machine was abandoned, the defendant procured another to do the work he had engaged, and on November 27th wrote the plaintiff's general agent that he could not make the machine come up to the warranty and was through with it, and closed with the words, "So you can let me know when you want to ship it, and please return my notes." To this the plaintiff replied, asserting that it was convinced that the machine worked up to the warranty and that it had done all required on its part, and that if there was any trouble with the working of the machine it was due to defendant's operation of it, and said: "Under these circumstances we cannot consider the return of the machine." Defendant did not return the machine to Hartland railroad station, where it was received, but stored it on the farm of a neighbor, where it has remained ever since. The court found substantially these facts and refused to find that defendant continued to use the machine after his final determination to reject it as not complying with the warranty; that the absolute refusal of the plaintiff to accept return of the machine absolved defendant from the duty of delivering it at the railroad station where obtained. Judgment was rendered dismissing the complaint, from which plaintiff appeals.

For the appellant there was a brief by *Cary, Upham & Black,* and oral argument by *J. J. Cook.*

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan* and *M. A. Jacobson.*

Dodge, J. The appellant contends against the judgment that defendant's right to rely upon breach of warranty was by the express terms of the contract dependent upon return of the machine to the place where received, which confessedly never took place. But it is found and established without

dispute that the defendant, when finally convinced of the defective character of the machine, notified plaintiff of that fact and asked its pleasure as to the time of returning it, implying his readiness to make such return according to the terms of the contract. To this the company, through its general agent, declared its determination to insist on the sufficiency of the machine and to refuse to accept its return in any way. It is a rule of law thoroughly established by many decisions that the positive declaration by one party of a determination which would render a prescribed act by the other futile excuses a specified performance or tender of that act. *Guetzkow v. Michigan Mut. L. Ins. Co.* 105 Wis. 448, 451, 81 N. W. 652; *Langnecker v. Trustees,* 111 Wis. 279, 87 N. W. 293; *Wuerfler v. Trustees,* 116 Wis. 19, 92 N. W. 433; *Swanke v. Herdeman,* 138 Wis. 654, 120 N. W. 414. Clearly the declaration of plaintiff's position that defendant had no right to surrender back the machine served to render any deposit thereof at the depot in Hartland futile and unreasonable and, we conclude, absolved him from the performance of that as a condition of his right to rescind for breach of warranty.

It is further contended in this connection that the authority of the general agent to waive any of the terms of the contract is not shown and is contradicted by the writing itself, which declares that no person "has authority to waive, alter, or enlarge this contract or to make any new or substituted or different contract, representation, or warranty. Salesmen, mechanics, or experts are not authorized to bind the company by any act, contract, or statement." There is some evidence of very general scope of the authority of the general agent in deciding and declaring the attitude of the company with reference to this machine and the plaintiff wholly refrained from offering any in contradiction of such authority. The court has found that the plaintiff company acted in this declaration made by its general agent, and we think such finding has support in the evidence offered by the defendant which the

plaintiff did not see fit to contradict. We therefore conclude that defendant's failure to actually transport the machine and leave it at Hartland is not an obstacle to his defense in this case.

2. It is further contended that defendant, after having finally decided that the machine was defective and did not satisfy the warranty, made use of it for his own benefit for parts of two days, and therefore is precluded from rescinding the contract for breach of warranty. Rules of law governing this subject were laid down, in the light of numerous citations, in *Fox v. Wilkinson,* 133 Wis. 337, 113 N. W. 669. The trial court evidently considered that the use made of the machine by defendant, after plaintiff's last effort to make it satisfy the warranty, was only by way of reasonable test, for he refused to find that it was an appropriation of the machine to defendant's own use and benefit consistent only with the attitude of ownership. The evidence, while perhaps ambiguous, preponderantly supports the former view. There is in such conduct, therefore, no obstacle to defendant's subsequent rescission of the contract of purchase.

By the Court.—Judgment affirmed.

WHITE, Respondent, vs. WHITE and others, imp., Appellants.

October 9—October 26, 1909.

Husband and wife: Alienation of affections: Parties: Evidence: Declarations of husband: Appeal: Harmless error: Punitory damages: Excessive damages.

1. **In an action by a wife for alienation of her husband's affections the husband is not a proper party defendant, since he was not a joint tortfeasor with those who wrongfully brought about his state of mind, and cannot be held to have joined or confederated with the active parties in the wrong constituting the cause of action.**

2. In such action the plaintiff may testify to declarations by her husband as to offers made to him by defendants to induce him to abandon her.
3. The erroneous admission of evidence is not prejudicial to appellants when it supports their claim and impeaches the case of the respondent.
4. In determining whether parents maliciously conspired to alienate their son's affections from his wife, the evidence should be considered in view of the rights of the parents and their obligations respecting their child's welfare and happiness.
5. In an action by a wife for a malicious conspiracy to alienate the affections of her husband, punitory damages may be awarded, even though one defendant is without property and the other is wealthy.
6. In an action by a wife for alienation of her husband's affections an award of $5,000 compensatory damages and $1,500 punitory damages is *held* not excessive.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed as to one defendant; affirmed as to the others.*

This is an action by the plaintiff, who is the wife of *Frederick H. White, Jr.*, for the alleged cause of action that the defendants maliciously, wrongfully, and wickedly confederated, conspired, and agreed to alienate and destroy the love and affection of *Frederick H. White, Jr.*, for plaintiff as his wife, and to induce him to desert her, and to prevent him from providing her the necessaries of life and of discharging toward her the duties of a husband. It is alleged that the defendants, to accomplish the objects of the malicious, wrongful, and wicked conspiracy and agreement, urged and persuaded *Frederick H. White, Jr.*, to desert and leave the plaintiff and to go and remain beyond the borders of the state, wherein plaintiff and her husband had resided as husband and wife up to the time he deserted her in July, 1905, and for this wrongful purpose the conspirators offered him sums of money and to pay him a fixed sum of money annually to so desert the plaintiff. It is also claimed that the defendants influenced him to wrongfully leave her by threatening that, if

he did not comply with such wrongful object, he would be disinherited and barred from securing any portion of his parents' estates. It is also alleged that *Frederick H. White, Jr.*, was induced to act upon such wrongful importunities, and that he became imbued with hatred and ill will toward plaintiff, which alienated and destroyed his affection for her, to her great injury and damage.

It appears that *Frederick H. White, Jr.*, is the husband of the plaintiff and that they were married December 11, 1901. The defendants *Frances L.* and Frederick H. White, Sr., are his parents. At the time of the marriage the plaintiff was twenty years of age and her husband was twenty-one. He was then attending a medical school and she a business college in Milwaukee. They had become acquainted about a year before their marriage, and for the two months preceding their marriage they had met daily on their car trips to and from Milwaukee and Waukesha. They were married without their parents' knowledge. The parents were informed of the marriage by telegram from the husband, and they returned to Waukesha, but did not immediately live in his parents' home, for the alleged reason that his parents were cool and indifferent toward plaintiff and her husband. A week thereafter plaintiff and her husband made their residence with his parents at Waukesha. His parents soon thereafter gave a reception to present plaintiff and her husband to the friends of the family. Plaintiff and her husband continued to reside with his parents at Waukesha until the summer of 1903. At different times during this period, while so residing together at the White home in Waukesha, disagreements and quarrels arose between plaintiff and her mother-in-law, *Frances L. White.* Her mother-in-law spoke of the plaintiff in a derogatory way, deprecated her marriage to her son, and characterized her as unfit to be his wife. In the summer of 1903 plaintiff and her husband moved to Milwaukee, where his parents assisted them to secure and furnish a dwelling,

which plaintiff and her husband occupied until the late autumn of 1904, when they broke up housekeeping and took up their residence with plaintiff's sister, Mrs. Barnum, at Waukesha, Wisconsin, where they continued to reside as husband and wife until July 10, 1905, when he left and refused longer to live with and provide for her, as he has ever since refused to do. The plaintiff avers that this desertion was the culmination of the malicious conspiracy of his parents and *Mary A. Stewart* to which her husband finally became a party. The husband asserts that he left her and refused further to live with and support her as his wife because of her ill treatment of him, due to her ungovernable disposition, which resulted in personal violence to him and a failure to do her duty as his wife.

It appears that *Mary A. Stewart* had lived with Mr. and *Mrs. White, Sr.,* for many years; that she was retained by them in their family; that she assisted in raising *Frederick* and the other children; that she was of aid and assistance in various ways to *Mrs. White* personally and also in the household affairs, and that she was actively interested in furthering *Frances L. White's* wishes and desires respecting plaintiff and her husband's marital relations and affairs. *Frances L. White,* her children, and *Mary A. Stewart* went to San Antonio, Texas, for the winter of 1904–05. They wrote letters from there to *Frederick H. White, Jr.,* in November and December, referring to plaintiff in terms of reproach, reflecting on her as unworthy of his care, attention, and society and as unfit to be his wife, and suggesting pecuniary inducements if he should rid himself of her and seek release from his marriage obligations. After the receipt of these letters he visited the family in Texas. The evidence tends to show that his mother and *Mary A. Stewart* then tried to induce him to leave plaintiff, return to his medical studies at his mother's cost, and that upon his declination to comply with their solicitations he was informed by them that his parents refused to

longer give him assistance and financial aid. In the following July he left the plaintiff and refused to reside with her as his wife or to maintain a home for her support. Since then he has resided with his parents and has attended medical college as his mother had proposed and urged him to do before he left the plaintiff.

Upon these facts and other evidential facts corroborative thereof the court found that no cause of action was shown against Frederick H. White, Sr., and Harry W. Wood and dismissed the action as to them. The court also found that the defendants *Frances L. White* and *Mary A. Stewart* contrived, conspired, and associated together for the purpose of preventing plaintiff from performing her marital duties toward her husband and from enjoying and receiving her husband's society and support; that they thus wrongfully and maliciously intermeddled in the marital relations of plaintiff and her husband, and maliciously urged, persuaded, and induced him to desert and abandon her that they might thereby accomplish their wrongful purpose of destroying his love and affection for her and of inducing him forever to desert her as his wife; and that they thereby had deprived her of his society and aid and comfort as a husband. The court awarded plaintiff $5,000 as compensation and $1,500 as punitory damages in the action, with costs. The court also found that the plaintiff's husband had joined his mother and *Mary A. Stewart* in the malicious and wrongful conspiracy and awarded judgment accordingly. This is an appeal from such judgment.

For the appellants there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan* and *M. A. Jacobson.*

For the respondent there was a brief by *Clasen & Walsh,* attorneys, and *Tullar & Lockney,* of counsel, and oral argument by *D. S. Tullar* and *E. D. Walsh.*

Siebecker, J. The defendants contend that the court erroneously held that plaintiff's husband was a proper party

defendant and a party to the conspiracy for the alienation and loss of his affection and society. Sec. 2345, Stats. (1898), as amended by ch. 17, Laws of 1905, provides that: "She [a wife] may also bring and maintain an action in her own name, and for her own benefit, for the alienation and the loss of the affection and society of her husband." This statute, which confers rights on a married woman to maintain an action in her own name as to her separate property, business, personal earnings, or for any injury to her person or character as if she were sole, had been construed before the amendment to confer on her the right to maintain an action against her husband for violation of those rights, as she had a right against strangers. *Carney v. Gleissner,* 62 Wis. 493, 22 N. W. 735; *Brader v. Brader,* 110 Wis. 423, 426, 85 N. W. 681.

The question here is: Is the husband a joint tortfeasor in the commission of the wrong constituting the plaintiff's cause of action? True, he was guilty of the wrong of leaving the plaintiff in consequence of the wrongful conspiracy and of causing her the loss of his affection and society. This, however, is the result of the tort alleged to have been committed by the other defendants, namely, their malicious purpose of the wilful and intentional alienation of him from her and the causing the loss of his affection and society. The gist of the action is the damage resulting to the plaintiff by the wrongful conduct of those who induced the alienation and the loss of her husband's affection and society. This is attributable to the acts and conduct of the persons who influenced the husband to yield to their wrongful purpose. Their acts in furtherance of this purpose constitute the tort for which the resultant damages are recoverable. It cannot be said that the husband was an active participant in carrying out the objects of the wrongful conspiracy to accomplish the alienation and the loss of the husband's affection for his wife and the consequent loss of his society by her. The wrongdoers acted upon and through him to accomplish their illegal purpose against the plaintiff, and the cause of action was complete when their

machinations had operated to cause plaintiff the alienation and the loss of affection and society of her husband. He is not, therefore, a joint tortfeasor with those who wrongfully brought about this state of mind, and hence he cannot be held to have joined or confederated with the other active parties in the wrong constituting the wife's cause of action. In so far as his conduct may be violative of any marital rights of the wife, he is personally responsible to her independently of the defendants' wrong through which he was led to breach his legal obligations, and the wife may seek her redress in an appropriate action against him. From these considerations it follows that he was not a party to the tort and hence not a proper party defendant.

It is suggested that this court passed on this question on the former appeal of the case (132 Wis. 121, 111 N. W. 1116) and held that the husband was a proper party defendant. This question was not presented on that appeal and is not embraced in the decision. The complaint, considered on that appeal upon general demurrer, also contains allegations to the effect that *Frederick H. White, Jr.*, and the other defendants, after his separation from the plaintiff, had maliciously conspired to entice and induce her into unchaste and criminal acts to degrade and injure her for the purpose of enabling her husband to legally separate from her. No proof was offered to sustain this allegation and it is therefore dropped from the consideration of the case on this appeal.

The court permitted plaintiff to testify to declarations made by her husband to her and others, which purport to give the offers and inducements held out to him by his parents to induce him to separate from and abandon the plaintiff. It is claimed that this was prejudicial error. This class of evidence has been held proper and competent as showing the influences producing the alienation and the loss of affection complained of and the cause of separation and the destruction of the marital relation. *Hardwick v. Hardwick,* 130 Iowa, 230, 106 N. W. 639; *Williams v. Williams,* 20 Colo. 51, 37

Pac. 614; *Nevins v. Nevins,* 68 Kan. 410, 75 Pac. 492. To the same effect is the case of *Horner v. Yance,* 93 Wis. 352, 67 N. W. 720.

It is contended that the court committed prejudicial error in receiving and considering the testimony of plaintiff's husband. An examination of his evidence shows that, though it was erroneously admitted, it could not have operated to the defendants' prejudice, since all of the material facts to which he testified supported the defendants' claims in the case and impeached plaintiff's case. Under this state of his evidence no prejudicial error resulted from its admission.

The defendants assert that the evidence does not support the court's findings to the effect that the defendants *Frances L. White* and *Mary A. Stewart* maliciously confederated together to injure the plaintiff through the alienation and the loss of affection and the society of her husband, and that their acts and conduct caused such alienation and loss of affection and society as resulted in an abandonment and separation from her. The proof relevant and material to these findings of the court embraces nearly all of the facts and circumstances disclosed by the evidence. The evidence is in positive and direct conflict on this issue. The inferences from the evidence depend, however, upon the weight and the credibility of the different witnesses testifying in the case considered in connection with the positive testimony contained in the letters and other evidence in the case. In determining whether the defendants did maliciously conspire to accomplish the alienation of the husband and the loss of his affection and society by the wife, the evidence should be considered in view of the rights of the parents and their obligations respecting their child's welfare and happiness. As stated in the recent case of *Jones v. Monson,* 137 Wis. 478, 487, 119 N. W. 183:

"The true test to be applied to the evidence in this class of cases is: Were the defendants in what they did actuated with reasonable parental regard for their child, or were they actu-

ated by unreasonable ill will towards the husband or wife, as the case may be?"

"Acts done by a stranger might well be regarded as malicious, while similar acts by the parents would not give rise to a well-grounded suspicion of bad intention."

It is strenuously urged that the evidence in this case fails to show that the defendants *Frances L. White* and *Mary A. Stewart* maliciously confederated together for the unlawful purpose charged, and that there is nothing to show that they attempted to carry out such purpose. As stated, the voluminous evidence on this issue embraces well nigh all the material facts and circumstances in the case and cannot profitably be restated here. The record contains positive evidence supporting the claim that these defendants combined and took actual steps to poison the mind of the plaintiff's husband against her and to induce him to separate from her as his wife. The circumstances of their conduct in the matter are cogent in support of this claim. True, much of the direct evidence of the defendants is a denial of any such purpose and an endeavor to explain the circumstances tending to show guilt. The court's conclusions, however, are clearly supported by the facts and circumstances shown, if the witnesses testifying thereto are worthy of credit and belief. The conclusions of the court as to the facts must stand unless we can say from the record before us that the evidence of the witnesses in support thereof is incredible or not of sufficient weight to warrant the court in finding these defendants guilty of the wrong alleged against them. After an attentive reading and consideration of the evidence, we cannot say that the witnesses testifying in support of the cause of action were not entitled to credit and that such evidence was insufficient in weight to sustain the findings. Upon the record it must be held that these defendants were guilty of maliciously confederating together to injure the plaintiff by effecting the alienation and the loss of affection and society of her husband.

It is asserted that the award of punitory damages is illegal because they are evidently allowed and fixed at the sum awarded upon the evidence of the wealth of the defendant *Frances L. White.* There is nothing in the case showing that the trial court awarded the punitory damages upon this ground. The claim that punitory damages are not proper in view of the fact that one of the defendants is without property and that another defendant is possessed of considerable means is not well founded. The cause of action arises out of the malicious conduct of the parties, and the wrongdoers can be subjected to punishment by the award of punitory damages therefor. We cannot say as matter of law that the trial court allowed an excessive amount of either compensatory or exemplary damages under the facts and circumstances of the case. The record presents no grounds for disturbing the judgment.

By the Court.—The judgment is reversed as to the defendant *Frederick H. White, Jr.,* and the cause remanded with directions to dismiss the action as to him. The judgment is affirmed in all respects as to the other defendants.

OLWELL, Respondent, vs. TRAVIS and others, Appellants.

October 9—October 26, 1909.

Highways: Establishment: Statutory proceedings: Presumptions from lapse of time: Ancient survey: Width: Change of limits: User: Deviation of travel: Costs: Discretion.

1. A petition to the road commissioners in 1847 for the laying out of a highway was recorded in the town records, as was also a survey headed "Survey of a public road for the town of O.," definitely describing the line of the road throughout, and signed by the surveyor and the commissioners. These were the only records as to the highway, but the road was opened and traveled,

at least partially, upon the line described. *Held* that, in view of the lapse of time, the survey must be regarded as an ancient document; and all proceedings leading up to the making of such survey will be presumed to have been regularly taken pursuant to Laws of 1843, p. 46, §§ 1, 2. It will be presumed, therefore, that the petitioners were freeholders residing in the town, although the petition does not show that fact, and that an order laying out the road had been regularly made. KERWIN, MARSHALL, and TIMLIN, JJ., dissent.

2. The established width of public highways at the time in question and since having been four rods, the road will be deemed to have been laid out of that width, with the line described in the survey as its center.
3. The fact that at a certain point a highway was traveled on one side only of the center line thereof as shown by the survey, did not operate to change the limits of the road as laid out.
4. Slight deviation of travel from a highway as laid out, and the maintenance of fences at irregular distances from the center line, though continued for more than twenty years, did not result in abandonment of any part of the highway or in the acquirement of title by user to any land outside of its limits, where there had never been any attempt to have the fences placed on the true line, but mere passive acquiescence in their remaining where placed, and no dedication of land for the highway outside of its limits as laid out.
5. A ruling of the trial court withholding costs in an equitable action will not be disturbed on appeal unless there was an abuse of discretion.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff and respondent against the defendants as supervisors of the town of Oconomowoc, Waukesha county, Wisconsin, to enjoin and restrain them from interfering with plaintiff in constructing a fence along the east line of his premises, the defendants claiming that the plaintiff was placing his fence within the limits of the highway. The findings of fact and conclusions of law are in substance as follows:

That the defendants were the duly elected, qualified, and acting supervisors of the town of Oconomowoc, Waukesha county, Wisconsin; that the plaintiff is a resident of the town

of Oconomowoc and the owner of the east half of the northeast quarter of section 23 of said town of Oconomowoc; that on the 16th day of March, 1847, the commissioners of public highways duly caused to be surveyed and did lay out a public highway four rods wide running from the northwest corner of section 13 in said town of Oconomowoc, south along the section line between sections 13 and 14 to the quarter-post on the east line of section 23, which highway runs, among other places, directly north and south along the east line of plaintiff's land; that a correct survey of said highway as laid out was made by Surveyor Rollo Powerie; that said highway has been traveled by the general public for over twenty years west of the center line of said highway as laid out and to a width of one and one-half rods from the section line, except in one or two places where the travel slightly diverged; that fences have existed and been maintained for more than twenty years along the east line of plaintiff's premises and at irregular distances from the center of the highway as surveyed and laid out and outside of and west of the west line of the highway as the same was laid out; that there never has been any attempt to have the fences along said highway placed along the true line as surveyed, and there has been no dedication of any land for highway purposes outside and west of the lines of the highway as surveyed, there simply being a passive acquiescence in the fences remaining where they have been placed, and that the public has acquired no rights, by user or otherwise, in any of the lands of the plaintiff for highway purposes west of the lines of the highway as laid out; that the plaintiff in building his fences placed and erected the same inside the limits of the highway as laid out, and that the authorities of the town of Oconomowoc have asserted and claimed that said highway extends upon the plaintiff's land and west of the west line of said highway as laid out and as determined and fixed by the Rollo Powerie survey; that there is and has been a controversy between the plaintiff and the

authorities of said town as to the true location of the west line of the highway along the east side of plaintiff's premises; that plaintiff built his fence upon what he in good faith believed to be the west line of the highway and for the purpose of inclosing his premises so that they might be used for pasturage.

And as conclusions of law the court found that the highway in question was duly laid out by the highway commissioners March 16, 1847, of the width of four rods, and that the center line thereof is the section line on the east side of plaintiff's premises between sections 23 and 24 in said town as established by Rollo Powerie, surveyor, whose survey is a correct survey of such highway; that there has been no legal dedication to the public of any land outside of the limits of the highway as originally laid out, and the public has acquired no rights except within the limits of the highway as originally laid out; that the plaintiff had no right to build the fence in question at the place he started to build it, but that he has a legal right to construct a fence east of where the old fence stood and on the west line of a four-rod highway as the same has been determined by the Rollo Powerie survey; that the public has acquired no rights in plaintiff's premises between the old fence and the west line of a four-rod road as established by the Powerie survey, and that the defendants are without authority to interfere with plaintiff's use and enjoyment of the same; that judgment shall be entered permanently enjoining and restraining the supervisors of said town, their agents and servants, from interfering with the construction and erection of a fence on the west line of a four-rod highway, said west line being two rods west of the section line between sections 23 and 24 as determined by Rollo Powerie; and also restraining and enjoining any interference with plaintiff's use and enjoyment of his premises west of said highway line; and enjoining and restraining the plaintiff from building a fence on a line one and one-half

rods west of said section line; no costs to be awarded to either party against the other, and the defendants to pay the clerk's fees.

Judgment was rendered in accordance with the findings of fact and conclusions of law without costs, except that defendants pay the clerk's fees in the court below, from which judgment this appeal was taken.

Anthony B. Rogan, attorney, and *C. E. Armin,* of counsel, for the appellants.

For the respondent there was a brief by *Ryan, Merton & Newbury,* and oral argument by *T. E. Ryan* and *M. A. Jacobson.*

KERWIN, J. A great many errors are assigned by appellants upon exceptions to the findings of fact and conclusions of law, but as we understand them they may all be classified under four heads: (1) Was the highway legally laid out four rods wide? (2) Is there sufficient competent evidence to support the findings as to the location of the section line between sections 23 and 24? (3) Is the highway in question a highway by user? And (4) should costs have been awarded to the defendants? If we correctly understand the appellants' brief, the foregoing propositions cover the material contentions of the appellants. After setting out the various assignments of error they state the controversy thus:

"The real questions litigated on the trial of this case in the court below were whether there was a highway by user, or whether said highway had been legally laid out and established by the road commissioners of the town of Oconomowoc, at the place where plaintiff erected his fence mentioned in his complaint, and whether or not plaintiff had a legal right to erect said fence where he did, and whether or not the defendants were justified in removing said fence in the manner in which they did."

1. It is first contended that the highway was not legally laid out, for the reason that the petition did not show that

the petitioners were freeholders residing in the town, and, further, that the survey is insufficient as an order laying out the highway, the petition and survey being the only records produced. It is the opinion of the court that after the lapse of time since the highway was laid out it must be presumed that the petitioners were freeholders residing in the town and the survey a sufficient order, under the rule laid down by this court in *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819. It seems that in finding a four-rod highway the court considered that the established width of public highways at the time the highway in question was surveyed was, and since has been, four rods, and that the line run by the surveyor should be the center of the highway. Terr. Laws of 1840, p. 33, No. 24, § 5. See, also, Laws of 1843, pp. 46–50, § 23; R. S. 1849, ch. 16, sec. 70; ch. 19, sec. 74, R. S. 1858; secs. 1264, 1294, Stats. (1898). So it seems the survey sufficiently described the width of the highway as four rods. *State v. Hogue,* 71 Wis. 384, 36 N. W. 860. The important question is whether the recording of the survey was sufficient evidence of the laying out of the road. It definitely described the line of the road throughout, and runs on the section line east of plaintiff's property between sections 13 and 14, 23 and 24. It is signed by the surveyor and the road commissioners, dated March 16, 1847, and is indorsed "Survey of Road." The survey begins by reciting, "Survey of a public road for the town of Oconomowoc," and then follows a description of the line from beginning to end. The petition to the road commissioners of the town to lay out the highway and the survey were recorded in the town records.

The road in *Randall v. Rovelstad, supra,* was opened by county commissioners under Terr. Stats. 1839, p. 107, sec. 4 of which provides for the appointment of viewers, and sec. 5 provides that said viewers, or a majority of them, shall view the route proposed, and, if deemed a public utility, shall lay out and mark such road on the best ground obtainable; and

sec. 6 provides that the viewers, or a majority of them, shall make a certified copy of their proceedings to the ensuing session of the board, when the same shall be publicly read, and if no objection is made to such proposed highway the board shall cause a record thereof to be made and order the road to be opened and repaired a necessary width, not exceeding sixty-six feet. Under this law it was held in *Randall v. Rovelstad, supra,* that the filing of the survey at a date more than forty years anterior to the time of trial was sufficient evidence that a highway had been laid out. As we have seen, sec. 6, p. 107, Terr. Stats. 1839, provides merely that a record shall be made of the highway, but it does not require a copy of the order to be filed, nor does it require that the survey shall embrace a copy of the order, and it was therefore held that because of the great lapse of time a record of the survey describing the road was sufficient evidence that it had been laid out. In the case before us, obviously, a road was laid out, not by county commissioners under the Statutes of 1839, but by the town commissioners under the Laws of 1843, and, as will be seen, the proceedings were somewhat different. The law required a petition to be made to the commissioners of the town by six or more freeholders, and further provided that whenever the commissioners of highways shall lay out a road they shall cause a survey or description to be made of such road and shall incorporate such survey in an order to be signed by them and filed and recorded in the office of the town clerk, who shall note the time of receiving the same. Laws of 1843, p. 46, §§ 1, 2. So it will be seen that under the Laws of 1843 the commissioners of highway in towns were required, when they laid out a road, to incorporate the survey in an order laying out the same and file it with the clerk. So that in this regard this law differs from the law under which the road was laid out in *Randall v. Rovelstad, supra.* However, it is the opinion of the court, in view of the great lapse of time since the filing of the petition and survey in the

instant case and the fact that the road had been opened and traveled, at least partially, upon the line described in the survey, that the survey must be regarded as an ancient document and all proceedings leading up to the making of such survey presumed to have been regularly taken; that the statute (§§ 1, 2, Laws of 1843) contemplates that the road shall be first laid out before the survey is made, and, notwithstanding there was not a strict compliance with the statute in the recording of an order embracing a copy of the survey, that the order must have preceded the survey and have been in existence and regularly made at the time the survey was made and recorded, though not incorporated in the survey; that the statute (§ 2) to the effect that whenever the commissioners of highways shall lay out any road they shall cause a survey or description to be made of such road means that the laying out of the highway shall precede the survey, and that since the survey was made and filed it must be presumed that all anterior steps leading up to the making and filing of the survey were regularly taken. *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819. True, at the point in question on the section line between sections 23 and 24 the road was traveled on the west side of the section line only, but this would not operate to change the limits of the road as laid out. *Maire v. Kruse,* 85 Wis. 302, 55 N. W. 389; *Reilly v. Racine,* 51 Wis. 526, 8 N. W. 417; *Randall v. Rovelstad, supra.*

2. The next question is whether the evidence is sufficient to support the finding on the location of the section line between sections 23 and 24. The claim of the appellants would throw the line farther west upon the property of the plaintiff and thereby shift the highway farther west. This point was strenuously contested on both sides and several surveys made and a mass of evidence offered, and the court below in its findings found in favor of the respondent on this proposition and adopted what was known in the case as the

Rollo Powerie survey as the correct survey, and we think the finding is well supported by the evidence.

3. It is further contended by appellants that a highway by user was established over the land actually used west of the section line. The court below found upon sufficient evidence that the highway was traveled by the general public for over twenty years west of the center line of the highway as laid out and to a width of one and one-half rods from the section line, except in one or two places where the travel slightly diverged. This contention brings us again to the question whether the highway was legally laid out four rods wide; and, this court holding in this case that it was, it is only called upon to further consider the effect of divergent travel along the general course of the highway for upwards of twenty years. The argument of appellants under this head is that the only lawful highway existing is the one which has been actually used; and, as we understand their argument, they base it upon two grounds: First, that, there being no highway laid out, one could be acquired only by user; and second, that even if a lawful highway had been laid out it was abandoned by nonuser. The court has already disposed of the first proposition by holding that a highway was laid out. Upon the second proposition the court below found on ample evidence that fences have existed and been maintained for more than twenty years along the east line of plaintiff's premises and at irregular distances from the center of the highway as surveyed and laid out and outside and west of the west line of the highway as laid out, and that there never has been any attempt to have the fences placed along the true line as surveyed, and there has been no dedication of any land for highway purposes outside of the west line of the highway, there simply being a passive acquiescence in the fences remaining where they were placed, and that the public has acquired no right by user or otherwise in any of the lands of plaintiff west of the lines of the highway as laid out, and

that the plaintiff in building his fences erected the same inside of the limits of the highway as laid out and as such highway in fact existed. Upon the facts found by the court below under this head it is well settled in this state that there could be no abandonment of any portion of the highway laid out or any title by user acquired outside of the lines of the highway as laid out. *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819; *Nicolai v. Davis,* 91 Wis. 370, 64 N. W. 1001; *Reilly v. Racine,* 51 Wis. 526, 8 N. W. 417. Counsel for appellants rely on *State v. Lloyd,* 133 Wis. 468, 113 N. W. 964, but in that case it will be seen that, although a four-rod highway had been laid out, subsequently a new road upon a different line from that formerly laid out was opened and traveled by the public and acquiesced in by the owners of the land, so the rule of slight deviation from the highway as laid out had no application and was so held by the court in that case.

4. It is also contended by appellants that the court erred in not awarding costs to the appellants. The case being in equity, the matter of costs was in the discretion of the court, and since we find no abuse of discretion we cannot disturb the ruling below in that regard.

The writer desires to say in conclusion that it is the opinion of Justices Marshall, Timlin, and himself that the judgment should be reversed upon the ground that there is no evidence that the alleged highway was ever laid out, but the majority of the court think otherwise, as indicated in the opinion of the court; therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

STARK, Appellant, vs. BACKUS, District Attorney, and others, Respondents.

October 9—October 26, 1909.

Sunday: Statutes: Construction: Barber shops: Constitutional law: Restraining enforcement of criminal law.

1. In sec. 4595, Stats. (1898), providing that "any person who shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except only works of necessity and charity . . . on the first day of the week shall be punished," etc., the exception of "works of necessity and charity" relates to the doing of "labor, business or work" and not to keeping open a "shop, warehouse or workhouse."
2. The proviso added to said sec. 4595 by ch. 300, Laws of 1909, that "keeping open a barber shop on Sunday . . . shall not be deemed a work of necessity or charity," did not change the effect of the statute or render it invalid as being discriminatory against the keepers of such shops and as denying to them the equal protection of the laws or depriving them of liberty or property without due process of law.
3. Neither before nor after the addition of such proviso could keeping open a barber shop on Sunday be justified as a work of necessity or charity; nor would the state be obliged, in a prosecution for keeping open any shop, workhouse or warehouse in violation of said section, to plead or prove that such act was not a work of necessity or charity.
4. Even if, when it enacted said proviso, the legislature supposed that the exception as to works of necessity and charity applied to the keeping open of a shop, warehouse, or workhouse, that fact is not controlling upon the question of the construction of the pre-existing statute.
5. The complaint in this action to have sec. 4595, Stats. (1898), as amended, declared void, and to restrain the district attorney and others from instituting any proceeding against plaintiff for violation thereof, is *held* not to make a proper case for the exercise of the power of a court of equity to enjoin the enforcement of the criminal law.

APPEAL from orders of the circuit court for Milwaukee county: GEO. W. BURNELL, Judge. *Affirmed.*

For the appellant there was a brief by *Kronshage, McGov-*

ern, Goff, Fritz & Hannan, and oral argument by *G. D. Goff* and *F. E. McGovern.* They contended, *inter alia,* that the remedy by injunction was proper: 22 Cyc. 903; 16 Am. & Eng. Ency. of Law (2d ed.) 372; 5 Pom. Eq. Jur. 632, 636; *Pennoyer v. McConnaughy,* 140 U. S. 1, 11 Sup. Ct. 699; *Davis & F. Mfg. Co. v. Los Angeles,* 189 U. S. 207, 23 Sup. Ct. 498; *Dobbins v. Los Angeles,* 195 U. S. 223, 25 Sup. Ct. 18; *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418; *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441; *Cain v. Daly,* 74 S. C. 480, 55 S. E. 110; *Bryan v. Mayor, etc.* 154 Ala. 447, 45 South. 922; *Deems v. Mayor, etc.* 80 Md. 164, 30 Atl. 648, 26 L. R. A. 542; *Greenwich Ins. Co. v. Carroll,* 125 Fed. 121; *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870; *Jos. Schlitz B. Co. v. Superior,* 117 Wis. 297, 93 N. W. 1120; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *Ritchie v. People,* 155 Ill. 98, 40 N. E. 454. The injunction should have been continued *pendente lite: Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096; *Quayle v. Bayfield Co.* 114 Wis. 108, 89 N. W. 892; *Bartlett v. L. Bartlett & Son Co.* 116 Wis. 450, 93 N. W. 473; *De Pauw v. Oxley,* 122 Wis. 656, 100 N. W. 1028. The statute in question (ch. 300, Laws of 1909) is unconstitutional: *Eden v. People,* 161 Ill. 296, 43 N. E. 1108; *Ex parte Jentzsch,* 112 Cal. 468, 44 Pac. 803; *State v. Granneman,* 132 Mo. 326, 33 S. W. 784; *State v. Lorry,* 7 Baxt. (Tenn.) 95; *Ragio v. State,* 86 Tenn. 272, 6 S. W. 401; *People v. Havnor,* 149 N. Y. 195, 43 N. E. 541; *Ex parte Westerfield,* 55 Cal. 550, 36 Am. Rep. 47; *Armstrong v. State,* 170 Ind. 188, 84 N. E. 3, 15 L. R. A. N. S. 646; *Pasadena v. Stimson,* 91 Cal. 238, 27 Pac. 604. To be distinguished: *Petit v. Minnesota,* 177 U. S. 164, 20 Sup. Ct. 666; *State v. Petit,* 74 Minn. 376, 77 N. W. 225; *People v. Havnor,* 149 N. Y. 195, 43 N. E. 541; *People v. Bellet,* 99 Mich. 151, 57 N. W. 1094; *Ex parte Northrup,* 41 Oreg.

489, 69 Pac. 445; *State v. Sopher,* 25 Utah, 318, 71 Pac. 482; *State v. Bergfeldt,* 41 Wash. 234, 83 Pac. 177. The statute was not enacted in response to any public need: *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468. The amendment of 1909 was special legislation: *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *Huber v. Merkel,* 117 Wis. 355, 94 N. W. 354; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071; *State v. Evans,* 130 Wis. 381, 110 N. W. 241; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; and several of the cases cited to other points. The proviso of 1909 was unreasonable: *Bonnett v. Vallier,* 136 Wis. 193; *State v. Redmon,* 134 Wis. 89; *State ex rel. Mil. Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500. The supreme court had already put a construction on this statute: *Jensen v. State,* 60 Wis. 577, 19 N. W. 374; *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139. And the proviso added in 1909 amounts to an assumption by the legislature of the judicial power of construing statutes: *Sinking Fund Cases,* 99 U. S. 700; *Comm. ex rel. Roney v. Warwick,* 172 Pa. St. 140, 33 Atl. 373; *James v. State,* 45 Tex. Crim. 592, 78 S. W. 951.

For the respondents the district attorney and sheriff of Milwaukee county there was a brief by *August C. Backus,* district attorney, and *Norman L. Baker,* assistant district attorney, and the cause was argued orally by *Mr. Baker.*

For the other respondents there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.* To the point that without reference to the constitutionality of the act in question this was not a proper case for the interposition of equity to arrest the enforcement of the criminal law, respondents cited: *Carroll v. Greenwich Ins. Co.* 199 U. S. 401,

26 Sup. Ct. 66; *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418; *In re Sawyer,* 124 U. S. 200, 8 Sup. Ct. 482; 2 Story, Eq. Jur. (13th ed.) § 893; *Fitts v. McGhee,* 172 U. S. 516, 19 Sup. Ct. 169; *Minneapolis B. Co. v. McGillivray,* 104 Fed. 258; *Logan v. Postal Tel. & C. Co.* 157 Fed. 570; *Arbuckle v. Blackburn,* 113 Fed. 616; *Christian Moerlein B. Co. v. Hill,* 166 Fed. 140; *Denver v. Beede,* 25 Colo. 172, 54 Pac. 624; *Poyer v. Des Plaines,* 123 Ill. 111, 13 N. E. 819; *Pleasants v. Smith,* 90 Miss. 440, 43 South. 475; *Chicago v. Chicago City R. Co.* 222 Ill. 560, 78 N. E. 890; *Delaney v. Flood,* 183 N. Y. 323, 76 N. E. 209; *Eden Musee Am. Co. v. Bingham,* 125 App. Div. 780, 110 N. Y. Supp. 210; *Suesskind v. Bingham,* 125 App. Div. 787, 110 N. Y. Supp. 213; *Shepard v. Bingham,* 125 App. Div. 784, 110 N. Y. Supp. 217; and many other cases. Even if the proviso added in 1909 was void the whole act is not void, and the officers should be permitted to prosecute under the valid remainder of the act, citing: 1 Lewis's Sutherland, Stat. Constr. (2d ed.) §§ 296 (169), 297 (170); *Lynch v. Steamer "Economy,"* 27 Wis. 69; *Wilcox v. Hemming,* 58 Wis. 144, 15 N. W. 435; and other cases. Upon the point that the statute was constitutional the respondents relied upon the cases cited and sought to be distinguished by the appellant *supra,* and added: *Judefind v. State,* 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721; *Quarles v. State,* 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192; *State v. O'Rourk,* 35 Neb. 614, 53 N. W. 591, 17 L. R. A. 830; *Phillips v. Innes,* 4 Cl. & F. 234; *Comm. v. Waldman,* 140 Pa. St. 89, 21 Atl. 248; *State v. Frederick,* 45 Ark. 347; *Stone v. Graves,* 145 Mass. 353, 13 N. E. 906; *Mills v. Charleton,* 29 Wis. 400; *Bound v. Wis. Cent. R. Co.* 45 Wis. 543.

Timlin, J. The appellant brought this suit in equity in his own behalf and in behalf of all others similarly situated against the sheriff and district attorney of Milwaukee county

and a guild or association of barbers and several members and officers of that guild, praying that a certain act of the legislature of this state, hereinafter referred to, be declared unconstitutional and void, and that the defendants and each of them be enjoined from issuing or attempting to issue any warrant or other criminal process against the appellant or his agents or servants, and from instituting or attempting to institute or maintain any proceeding, action, or suit, civil or criminal, against the plaintiff, for violation of said pretended law. Appellant based his claim to this relief upon the fact that he is a citizen duly licensed or registered as a barber and resides in Milwaukee, where he has conducted for more than ten years last past and now conducts, in or adjacent to a great hotel called the Plankinton House, a large barber shop, with manicuring, bathing, shoe-polishing, and clothes-cleaning adjuncts; that he employs therein a large number of barbers and others, and he has expended large sums of money in fitting up said shop for these purposes, and has been accustomed to keep the shop with all its adjuncts open on Sunday for the accommodation of the public generally, and for that of the guests and patrons of said hotel particularly, and for his own gain. He avers that he has thereby built up and established a large and profitable trade, larger and more profitable on Sunday than on any other day, and dependent on this Sunday patronage. Great and irreparable loss will fall upon the appellant and great inconvenience result to his said patrons if this business is not permitted to continue as it has heretofore been carried on. The defendant *Milwaukee Branch of the Wisconsin Barbers' Association,* and the other defendants (except the sheriff and district attorney), and other persons unknown, did prior to the passage of the act in question "combine, associate, agree, mutually undertake, and concert together for the purpose of wilfully and maliciously depriving the plaintiff of the good will of his business and to bring about his personal and business ruin, and in further-

ance of such conspiracy were active in and responsible for the passage of the act in question, and caused said statute to be prepared and introduced in the legislature, and used their efforts, influence, and persuasion to have it enacted." Then, in furtherance of the same unlawful conspiracy, and to degrade the plaintiff and prejudice him before the public, and to injure and destroy plaintiff's business, they now, after the passage and publication of the act in question, threaten and intend to prosecute the plaintiff and his agents and servants under the said law by many and continued prosecutions, if plaintiff keeps open his said shop or place of business on Sunday for the purpose of engaging in the business before described. Repeated prosecutions and many arrests of the plaintiff and his employees are threatened if they continue to operate this shop on Sunday. This would result in a multiplicity of suits, in each of which the question of the constitutionality of this statute would be raised and must be determined. Upon a complaint of this kind the appellant obtained from a court commissioner an injunctional order prohibiting the defendants and each of them until the further order of the court from issuing or attempting to issue, applying for or having issued, any warrant or process against the appellant, and from instituting or attempting to institute any action or proceeding, civil or criminal, against the appellant for any alleged violation of said pretended law. On motion the circuit court, at the instance of the sheriff and district attorney by one order, and at the instance of the other defendants by another and separate order, vacated the said injunctional order, and these appeals by the plaintiff are from the last-mentioned orders of the circuit court.

2. Two questions are presented for consideration: Is the statute in question valid? Is there a proper case presented for enjoining the sheriff and the district attorney from enforcing the criminal law? The appellant makes no attack upon Sunday laws in general, conceding in substance, as we

understand him, that the legislature has power to select "the venerable day of the Sun," or the no less venerable "Sabbath Day," and enforce in the interest of public health and welfare a cessation of business and labor on that day. But it is contended that because of the change in the statute law on that subject wrought by ch. 300, Laws of 1909, the law is no longer uniform in its operation, but absolutely prohibits those engaged in shaving and hair cutting, and incidentally those engaged in conducting as adjuncts to such business bathing, manicuring, shoe-polishing, and clothes-cleaning departments, from keeping open a shop or workhouse on Sunday. It accomplishes this by declaring that keeping open a barber shop on that day for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity, while it permits keepers of similar shops, indistinguishable upon any proper or lawful basis of classification, to require the state to show that similar acts upon that day on their part were not works of necessity and charity, or permits such persons to show that similar acts on their part were acts of necessity or charity and so justify their like acts and escape conviction. It is contended that, there being no reasonable or valid ground for such distinction or classification, the act in question with the proviso of 1909 denies to appellant the equal protection of the law and deprives him of liberty and property without due process of law, thus contravening secs. 1 and 8, art. I, of the constitution of Wisconsin, and art. XIV of the constitution of the United States.

The following general Sunday law, apparently borrowed from Massachusetts, has been upon our statute books since 1849:

"Any person who shall keep open his shop, warehouse or workhouse, or shall do any manner of labor, business or work, except only works of necessity and charity . . . on the first day of the week shall be punished by fine not exceeding ten dollars; . . . no civil process shall be served or executed on said day." Sec. 4595, Stats. (1898).

The legislature of 1909, by ch. 300 of the laws of that year, amended this statute, thereby making no change except by adding:

"Provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity."

It will be observed that prior to the amendment of 1909 the exception of works of necessity and charity related to "labor, business or work" and not to keeping open a shop, warehouse, or workhouse. This we think is very apparent from the words of the statute, and this has been the construction of the similar statute in Massachusetts. *Comm. v. Dextra,* 143 Mass. 28, 8 N. E. 756; *Comm. v. Starr,* 144 Mass. 359, 11 N. E. 533; *Comm. v. Osgood,* 144 Mass. 362, 11 N. E. 536; *Comm. v. Dale,* 144 Mass. 363, 11 N. E. 534; *Comm. v. Has,* 122 Mass. 40; *Comm. v. Nagle,* 117 Mass. 142; *Comm. v. Collins,* 2 Cush. 556. There is quite a variety of Sunday statutes, and it aids very little in clearing up the situation in hand to cite cases from the courts of Illinois, California, or New York, where the Sunday statutes are essentially different. Such cases may be useful and indeed highly persuasive upon the proposition that where the statute does, without reasonable ground therefor, discriminate against barbers or barber shops it will be held invalid, but do not at all touch the question whether the statute here does so unreasonably discriminate.

We do not find that this court has ever held that the exception contained in the statute under consideration related to the offense of keeping open on Sunday a shop or workhouse. If we consult only the syllabus of *Jensen v. State,* 60 Wis. 577, 19 N. W. 374, that case would seem to lend color to the contention that the exception in question applied to all offenses under this section of the statutes; but the complaint held to be defective is preserved in the report of that case, and from this it appears that the accused was there charged, not with keeping open a shop or workhouse, but with an act

of "labor, business, or work." So we must conclude that prior to the amendment of 1909 the appellant could not have justified the keeping open of his barber shop on Sunday upon the ground that this was a work of necessity or charity, for the reason that the exception in the statute in question did not at all relate to the offense of keeping open a shop or workhouse, if for no other reason. The appellant could have made no such defense prior to the amendment of 1909, and he can make no such defense after this amendment where he is charged with keeping open his shop or workhouse. The state, upon such a charge fully and properly pleaded, was not then, and is not now, required to negative this exception by pleading or proof. On the other hand, then as now, if the appellant was charged with an act of shaving or hair cutting on Sunday, the state must negative the exception in the statute by pleading and proof (*La Point v. Cady,* 2 Pin. 515; *Splinter v. State, post,* p. 567, 123 N. W. 97), or the appellant so charged might aver if he pleased, and prove if he could, that the act was one of necessity or charity. It may, however, be noticed in passing that in Michigan, where the Sunday statute is so framed that the exception does apply to the offense of keeping open shop, it was decided that the legislature had power to withdraw the benefit of the exception from barber shops on the ground that there did or might exist sufficient reasons for applying a different rule to such shops. *People v. Bellet,* 99 Mich. 151, 57 N. W. 1094.

But it may be argued that the legislature of 1909 thought that the exception with respect to works of necessity and charity applied to the offense of keeping open a shop or workhouse for the purpose of carrying on business therein, or it would not have amended the law by adding the proviso in question. This is probably true as matter of fact, but not controlling in questions of construction. 26 Am. & Eng. Ency. of Law (2d ed.) 680, and cases cited; *Railroad Tax Cases,* 13 Fed. 722. Adding such proviso to an existing law is not the same as making it part of a new statute. The

legislature may well have been mistaken with reference to a matter so much outside of its jurisdiction as the construction of a pre-existing statute. *McNaughton v. Ticknor,* 113 Wis. 555, 89 N. W. 493.

Considering the clear language of the former statute, the amended statute only tends to the conclusion that the later legislature acted from abundant, or perhaps superabundant, caution. *State v. Petit,* 74 Minn. 376, 77 N. W. 225, affirmed *Petit v. Minnesota,* 177 U. S. 164, 20 Sup. Ct. 666. The Minnesota statute under consideration in the cases last cited presented a much stronger case against the validity of the proviso than the case at bar. There was by that statute no separate offense created and not affected by the exception, but all labor on Sunday was prohibited excepting only works of necessity and charity. Works of necessity and charity were then defined by the same statute to include whatever is needful during the day for the good order, health, or *comfort* of the community. To this was afterwards added a proviso in the same words as the proviso here in question. But it was considered that the act of keeping open a barber shop on Sunday as mentioned in the proviso could not come within the exception prior to the amendment because not a work of necessity or charity, notwithstanding the broad scope given those words by the definition found in the statute, and that the addition of the proviso was but the result of abundant caution on the part of the legislature. Our statute as it now exists, with the proviso of 1909 added, contains no discriminatory features, and its validity must be affirmed.

3. Aside from the question of the constitutionality of the act of 1909, this complaint did not make a proper case for the exercise of the power of a court of equity to enjoin the enforcement of the criminal law, and it is not to be presumed from the brevity of the opinion upon this point that the question has not been carefully considered and fully determined.

By the Court.—The orders appealed from are affirmed.

SPLINTER, Plaintiff in error, vs. THE STATE, Defendant in error.

October 9—October 26, 1909.

Criminal law: Pleading: Negativing exceptions: Statutes: Sale of adulterated milk.

1. Where an exception is stated in a separate section of the statute and constitutes no essential part of the definition or description of an offense, it need not be negatived by the prosecution, but is a matter of defense.
2. Thus, in a prosecution under sec. 4607, Stats. (Supp. 1906; Laws of 1905, ch. 138), for having in possession adulterated milk with intent to sell it, the state need not allege or prove that it was not to be sold as and for "skimmed milk," within the exception stated in sec. 4607*a*.
3. Having in possession seventeen cans of milk with intent to sell the same, in six of which cans the milk contained less than the prescribed percentage of milk fat, was a violation of the statute, although the average of the entire lot was above the legal standard.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, was arrested on a complaint charging that on October 30, 1907, in the county of Milwaukee and state of Wisconsin, *Frank L. Splinter* did then and there unlawfully have in his possession, with intent then and there to unlawfully sell, adulterated milk, which said milk contained less than three per centum of milk fat, contrary to the statute, etc. The defendant was a milk dealer and was selling considerable quantities of milk to the George Ziegler Company under contract. Of the seventeen cans delivered on October 30th, six contained less than three per centum of milk fat. Under the contract the defendant was required to furnish milk that would show an average test of three and three-tenths per centum of milk fat.

The defendant, at the close of the evidence offered by the

state, moved that he be discharged for lack of evidence to show that a crime had been committed. The motion was denied and defendant excepted to the ruling of the court. The defendant was found guilty, and thereafter he made a general motion in arrest of judgment, in which no specific grounds for arresting the judgment were set forth. The motion was denied and exception was taken to such ruling. From the judgment of conviction defendant prosecutes this writ of error.

The following errors are assigned: (1) Refusal to discharge because no offense was stated in the complaint; (2) failure to discharge for want of evidence showing guilt on the part of the defendant; (3) because the verdict is contrary to the evidence and contrary to law.

For the plaintiff in error there was a brief by *Schwefel & Knoell,* and oral argument by *Adolph Schwefel.*

For the defendant in error there was a brief by *August C. Backus,* district attorney, and *Norman L. Baker,* assistant district attorney, and the *Attorney General,* of counsel, and oral argument by *Mr. Baker.*

Barnes, J. Sec. 4607, Stats. (Supp. 1906; Laws of 1905, ch. 138), makes it a misdemeanor for any person to sell, offer to sell, or have in his possession for the purpose of sale, any adulterated milk. Sec. 4607*a* provides that in all prosecutions under the preceding section the term "adulterated milk" shall mean milk containing less than three per centum of milk fat. The section further provides that nothing in the act shall be construed as prohibiting the sale of milk commonly known as "skimmed milk," when the same is sold as and for "skimmed milk."

The defendant contends that the complaint is faulty because it does not allege that the milk in question was not kept and offered for sale as skimmed milk, and that the proof submitted by the state was insufficient to sustain a conviction because it failed to establish the same fact. The sufficiency

of the complaint is not raised by any exception. The sufficiency of the evidence is raised by an exception to the refusal of the court to discharge the defendant after the state had rested its case. The proviso in regard to the sale of skimmed milk is not found in sec. 4607, which makes it an offense to sell adulterated milk, but is found in the following section. The rule is quite general that where an exception is in a separate section of the statute, or in a proviso which is distinct from the enacting clause, it is a matter of defense which the prosecution need not anticipate or notice. *Metzker v. People,* 14 Ill. 101; *Sokel v. People,* 212 Ill. 238, 72 N. E. 382; *Alexander v. State,* 48 Ind. 394; *Russell v. State,* 50 Ind. 174; *State v. Williams,* 20 Iowa, 98; *State v. Van Vliet,* 92 Iowa, 476, 61 N. W. 241; *State v. Gurney,* 37 Me. 149; *State v. Boyington,* 56 Me. 512; *Comm. v. Hart,* 11 Cush. 130; *People v. Phippin,* 70 Mich. 6, 37 N. W. 888; *Kline v. State,* 44 Miss. 317; *State v. McGlynn,* 34 N. H. 422; *State v. Cassady,* 52 N. H. 500; *Mayer v. State,* 63 N. J. Law, 35, 42 Atl. 772; *State v. Price,* 71 N. J. Law, 249, 58 Atl. 1015; *Comm. v. Shelly,* 2 Kulp (Pa.) 300; *Villines v. State,* 96 Tenn. 141, 33 S. W. 922; *Bell v. State,* 104 Ala. 79, 15 South. 557; *State v. Railroad Co.* 54 Ark. 546, 16 S. W. 567; *State v. Thompson,* 2 Kan. 432; *Comm. v. Benge,* 13 Ky. Law Rep. 591; *Barber v. State,* 50 Md. 161; *State v. Cox,* 32 Mo. 566; *State v. Harris,* 119 N. C. 811, 26 S. E. 148.

Such rule was adopted in this state in *Byrne v. State,* 12 Wis. 519. The modification of this rule adopted by some courts is that it is necessary to negative an exception or proviso not contained in the enacting clause of a statute where it constitutes an element of the description of the offense. *U. S. v. Cook,* 17 Wall. 168, 173, and cases cited in 22 Cyc. 346. There is no difficulty about stating an offense under sec. 4607, Stats. (Supp. 1906; Laws of 1905, ch. 138), without negativing the proviso contained in sec. 4607*a*. Under a statute prohibiting the sale of liquors to Alaska Indians except

"for medicinal, mechanical, or scientific purposes," it was held not necessary to negative the exceptions, because they constituted no essential part of the definition of the offense. *Shelp v. U. S.* 81 Fed. 694, 26 C. C. A. 570. The following cases also hold that it is unnecessary to negative such a proviso as the one under consideration: *State v. Kendig,* 133 Iowa, 164, 110 N. W. 463; *State v. Weller,* 171 Ind. 53, 85 N. E. 761; *Hale v. State,* 58 Ohio St. 676, 51 N. E. 154; *State v. Heffernan,* 28 R. I. 477, 68 Atl. 364; *Mayer v. State,* 64 N. J. Law, 323, 45 Atl. 624.

Otherwise we deem the proof sufficient to sustain a conviction. Six of the seventeen cans examined were below the legal standard. Taking the average test of the entire lot it was a trifle above such standard. But the statute makes it an offense for any person to have in his possession with intent to sell or offer for sale "*any* adulterated milk." Manifestly, six separate cans containing forty-eight gallons of milk fell within the condemnation of the statute, unless they contained skimmed milk which was kept for sale and sold as such. Instead of showing that the milk in question was kept for sale and sold as skimmed milk, the evidence of the defendant showed quite conclusively that it was not.

By the Court.—Judgment affirmed.

DONOVAN, Plaintiff in error, vs. THE STATE, Defendant in error.

October 9—October 26, 1909.

Rape: Evidence: Corroboration.

A conviction of rape cannot be sustained upon the uncorroborated testimony of a prosecuting witness whose story is intrinsically improbable and almost incredible, especially if she is a person of feeble mind.

ERROR to review a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Reversed.*

For the plaintiff in error there was a brief by *Gustav Buchheit,* attorney, and *Kronshage, McGovern, Goff, Fritz & Hannan,* of counsel, and oral argument by *Mr. Buchheit* and *Mr. F. E. McGovern.*

For the defendant in error there was a brief by the *Attorney General, R. W. Lueck,* district attorney, and *F. T. Tucker,* assistant attorney general, and oral argument by *Mr. Lueck.*

WINSLOW, C. J. It is not believed that any good purpose would be served by a recital of the testimony in this case. The plaintiff in error was convicted of rape. The crime was charged to have been committed June 1, 1906, upon the person of one Elsie Weichert, who was then under fourteen years of age and was adjudged a feeble-minded person before the trial. The conviction was based upon the uncorroborated testimony of the prosecuting witness alone, and her story was intrinsically improbable and almost incredible. Under these circumstances the conviction cannot be sustained. The rule in such cases is that "where the evidence of the prosecuting witness bears upon its face evidence of unreliability, to sustain a conviction there should be corroboration by other evidence as to the principal facts relied on to constitute the crime." *O'Boyle v. State,* 100 Wis. 296, 75 N. W. 989; *Hofer v. State,* 130 Wis. 576, 110 N. W. 391. Especially must this rule be held applicable in a case where the prosecuting witness is a person of feeble mind.

By the Court.—Judgment reversed, and action remanded for a new trial.

IN RE CARPENTER: SANBORN, Appellant, vs. CARPENTER, Respondent.

October 5—November 12, 1909.

Incompetent persons: Guardians: Refusal to appoint: Who may appeal: "Person aggrieved."

1. Under sec. 3976, Stats. (1898), any relative or friend of a person alleged to be mentally incompetent may institute a proceeding in the county court for appointment of a guardian, but under sec. 4031, besides certain specified official persons, only a "person aggrieved" by the determination of the court can appeal therefrom.
2. No person is "aggrieved," within the meaning of said sec. 4031, unless the determination affects adversely his legal rights; mere affront to desire or sentimental interest being insufficient.
3. Next of kin or heirs apparent have no legal rights or interest in the property of a living relative.
4. Refusal to appoint, upon the petition of nonresident adult sister, a guardian for an alleged incompetent adult residing in this state, did not affect any legal rights of the petitioner, she having no legal right to control the custody or conduct of the alleged incompetent, no legal right to support from, or legal duty of care or support to, the latter, and no legal rights in or to the property of the latter.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Appeal dismissed.*

The appellant, *Eliza E. Sanborn,* a nonresident of this state, but a sister of the alleged incompetent, who together with another sister and a brother are the next of kin, applied to the county court for the appointment of a guardian to conserve the property of *Sarah A. Carpenter,* alleging her incompetence. The county court decided in favor of the application, which decision, on appeal to the circuit court, was reversed and cause remanded, whereupon the county court entered its order denying the petition, from which order this appellant appealed to the circuit court, where, no evidence being offered in support of the petition, judgment was entered

affirming the order of the county court, from which judgment said petitioner appeals. *Sarah A. Carpenter* moves to dismiss the appeal on the ground that *Eliza E. Sanborn* has no interest and is not aggrieved and is therefore incompetent to bring the appeal.

For the respondent, in support of the motion, there was a brief by *John H. Paul,* attorney, and *Miller, Mack & Fairchild,* of counsel, and oral argument by *Mr. Paul* and *Mr. Geo. P. Miller.*

For the appellant, *contra,* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *J. V. Quarles, Jr.*

DODGE, J. The proceeding authorized by our statutes (sec. 3976 *et seq.,* Stats. 1898) for the appointment of guardians for incompetent persons involves a most violent interference with the most sacred rights of property and civil liberty, unless, indeed, there does exist the full degree of incompetency specified by the statute. Unless that exists, and therefore in the question whether it exists, the alleged incompetent of course has the most obvious interest adversary to the proceedings. When, however, incompetency does exist, and is or threatens to be effective in the dissipation of property and impoverishment of the subject, doubtless the welfare of both the incompetent person and of the community at large is involved in favor of affirmative action. It is in line with such considerations that the statute vests in the county court authority to proceed to investigate upon the subject being brought to its notice by even a relative or a friend of the alleged incompetent, irrespective of any pecuniary or other legal interest which such petitioner may have in the matter. It does not follow from this, however, that the legislature has deemed it essential to the protection of either the incompetent person or the public that the determination reached by the county court, a court of great dignity and or-

ganized to be intrusted with most important jurisdiction and responsibility, shall be subject to appeal by persons having no legal interest to justify their further interference. *Nimblet v. Chaffee,* 24 Vt. 628; *Studabaker v. Markley,* 7 Ind. App. 368, 34 N. E. 606; *In re Guardianship of McLaughlin,* 101 Wis. 672, 78 N. W. 144; *In re Guardianship of Welch,* 108 Wis. 387, 84 N. W. 550. The legislature may well have believed that the county courts were competent tribunals to which, so far as the public welfare was concerned, those questions might finally be submitted, and that they did so view it is not antagonized by the fact that appeals lie in all cases from decisions of the county courts, in favor of individuals whose legal rights are claimed to be invaded by such decisions. The statutes themselves are significant of a marked distinction as to the conditions and persons that may originally arouse the duty of the county court to inquire into competency and those which may justify attack on its decisions and thereby greatly enhance and aggravate the injury to the subject of the charge by multiplication of litigation and expense.

While sec. 3976, Stats. (1898), permits any relative or mere friend to awaken the activities of the county court in the first instance, the right to appeal is limited to certain specified official persons and to "any person aggrieved" by the determination which that court may make. Sec. 4031, Stats. (1898). This phrase of the statute has from the earliest days been construed to the effect that no one can be aggrieved, in the sense of the statute, unless the determination affects adversely his legal rights; that mere affront to desire or sentimental interest is insufficient. *Strong v. Winslow,* 3 Pin. 27; *Marx v. Rowlands,* 59 Wis. 110, 17 N. W. 687; *In re Guardianship of McLaughlin,* 101 Wis. 672, 78 N. W. 144; *Estate of Cole v. Beurhaus,* 102 Wis. 1, 78 N. W. 402.

Obviously no personal rights of appellant are involved, for an adult nonresident sister has no legal right to control the custody or conduct of another adult sister residing here, nor

any right to support from, or legal duty of care or support to, the latter. It is equally obvious that no legal rights of appellant in or to property are affected. Even a next of kin or heir apparent has no right or legal interest in the property of a living relative. *Nemo est hæres viventis.* Broom, Leg. Max. (7th Am. ed.) 522. By reason of the absolute right of disposal of property by the owner, any expectancy or chance of inheritance is too conjectural and remote to be recognized as a legal right. *In re Guardianship of McLaughlin, supra; Hamilton v. Probate Court,* 9 R. I. 204; *Nimblet v. Chaffee, supra.* So that the appellant is not a party aggrieved as the term in sec. 4031 is ordinarily construed.

No analogy exists, as claimed, between the mere petitioner in guardianship proceedings and an administrator or executor who, as suggested by appellant, may appeal from order of the county court although without private interest in an estate. *McKenney v. Minahan,* 119 Wis. 651, 97 N. W. 489; *In re Paulson's Will,* 127 Wis. 612, 107 N. W. 484. The right of administrators and certain other officers to appeal is expressly conferred upon them by statute *ex officio* (sec. 4031, Stats. 1898), and is not expressly conferred on a mere petitioner.

It is, however, argued by appellant that a more liberal interpretation should be given to the word "aggrieved" in guardianship proceedings by reason of their peculiar character and purposes and the probability at least of the incapacity of the object of them to care for his own interests; and it is urged that the word should be extended to those upon whom will be cast the legal duty to support the alleged incompetent in case of the dissipation of his property, or to those who, being directly and legally dependent upon him for support, will be deprived of their legal right to such support, and also, which is alone material to the present appeal, that it should be extended to next of kin or heirs apparent who, in the absence of other disposition, would inherit in case of the death of

the alleged incompetent person. This general contention was in part favorably considered in *Merrill v. Merrill,* 134 Wis. 395, 114 N. W. 784, where it was held that a son, resident in this state, and charged by law with the duty of supporting his father in case the latter became indigent, had such direct interest in conserving his father's estate that he might appeal from an order refusing appointment of guardian. The case went no further, and repudiated any decision upon the point material to this case. The distinction in the case of a mere next of kin or heir apparent is that the burden of support cast on a son is an injury to a right presently existing in the person seeking to protect it, while, as already pointed out, the mere heir apparent has no present legal right whatsoever, but a mere conjectural expectancy.

True, several cases are cited by appellant where the courts of other states have held in favor of the right of such an heir to appeal in guardianship proceedings. *Tierney v. Tierney,* 81 Neb. 193, 115 N. W. 764; *In re Olson,* 10 S. Dak. 648, 75 N. W. 203; *Boynton v. Dyer,* 18 Pick. 1; *Lawless v. Reagan,* 128 Mass. 592; *Briard v. Goodale,* 86 Me. 100, 29 Atl. 946. In each of these cases, however, a careful examination will disclose that the right to appeal is predicated upon some special and peculiar statutory provision, either expressly or impliedly declaring a legislative purpose that such heir apparent or other relative be deemed to have a legal interest in the proceedings. See *Penniman v. French,* 2 Mass. 140. Apart from such cases there are of course others to the effect that relatives or friends may be allowed to act as next friend, or, as in this state, as guardian *ad litem,* to bring appeal in the interest of the alleged incompetent person. We have not had called to our attention or found any direct authority that, in the absence of other statutory direction, a mere heir apparent or next of kin can be deemed to be aggrieved for the purposes of an appeal in such proceedings. The contrary is held in many jurisdictions. *State ex rel. Amy v. Bazille,* 81 Minn. 370, 84 N. W. 120; *Studabaker v. Markley,* 7 Ind.

App. 368, 34 N. E. 606; *Hamilton v. Probate Court,* 9 R. I. 204; *Nimblet v. Chaffee,* 24 Vt. 628.

For reasons hereinbefore stated, and amplified in the decisions cited, we have reached the conclusion that the legislature did not intend, and it would not be promotive of public policy, to extend the right of appeal and the ordinarily well-recognized limitation of the term "aggrieved" in appeal statutes further than was declared in *Merrill v. Merrill, supra.*

We therefore hold that the appellant here is shown to have suffered no injury to her legal rights and is not aggrieved by the judgment appealed from, and therefore has no right by our statute to appeal.

By the Court.—Appeal dismissed.

IN RE CARPENTER: SANBORN, Appellant, vs. CARPENTER, Respondent.

October 5—November 12, 1909.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Appeal dismissed.*

This appeal is in the same matter as *In re Carpenter, ante,* p. 572, 123 N. W. 144: presents first an appointment of a special guardian by the county court before hearing on the application for a general guardian. Subsequently, upon finally denying the petition for general guardian in compliance with the mandate of the circuit court, the county court entered order canceling and setting aside its former order appointing a special guardian. From that order the petitioner appealed to the circuit court, where, on May 14, 1909, judgment was entered affirming said order of the county court, from which judgment said petitioner appeals. *Sarah A. Carpenter,* the respondent, moves to dismiss said appeal for the same reason stated in *In re Carpenter, ante,* p. 572, and other reasons.

For the respondent, in support of the motion, there was a brief by *John H. Paul,* attorney, and *Miller, Mack & Fairchild,* of counsel, and oral argument by *Mr. Paul* and *Mr. Geo. P. Miller.*

J. V. Quarles, Jr., of counsel, *contra.*

PER CURIAM. The same reasons which necessitate the dismissal of the appeal in *In re Carpenter, ante,* p. 572, 123 N. W. 144, set forth in the opinion presently filed therein, equally necessitate similar action in this case.

The appeal is dismissed.

SCHEUNERT, Respondent, vs. ALBERS and others, imp., Appellants.

October 8—November 12, 1909.

Conspiracy: Instituting inquiry as to sanity: Justification: Court and jury.

In an action for damages for a malicious conspiracy to cause plaintiff's commitment to an asylum for the insane, the evidence is *held*, as a matter of law, to show that defendants were justified in instituting the judicial inquiry as to plaintiff's sanity, it appearing that they acted in good faith upon information which came to them from sources entitling it to credit and which was of such nature as to justify a belief in the minds of men of reasonable intelligence and prudence that plaintiff was mentally deranged.

APPEAL from a judgment of the circuit court for Ozaukee county: W. J. TURNER, Judge. *Reversed.*

An action for damages wherein plaintiff alleges he was injured by the defendants maliciously conspiring together to bring about his illegal commitment to an asylum for the insane for the wrongful purpose of preventing publication of the fact that adulterous relations existed between plaintiff's wife and the defendant *Henry A. Albers.* The court dismissed the action as to the defendant Herman Heuer. The jury found that the defendant Theodore Hollnagel acted in good faith and without malice, and no judgment was awarded against him. Judgment was awarded against the other defendants for the damages found by the jury, amounting, with the costs, to $578.83. The defendants made various motions which raised the question of the sufficiency of the evidence to sustain the findings of the jury, the correctness of the instructions given, and other alleged errors. This is an appeal from the judgment.

For the appellants there was a brief by *Joseph B. Doe* and *William F. Schanen,* and oral argument by *Mr. Doe.*

For the respondent there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.*

SIEBECKER, J. It appears that on July 15, 1907, the defendants Theodore Hollnagel, *John E. Mueller,* and *Chas. A. Maas* presented a petition to the county judge of Ozaukee county for a judicial inquiry as to plaintiff's mental condition and for an order committing him to an insane asylum if he should be found to be insane. Thereupon the county court appointed Drs. William P. McGovern and George F. Savage, residing in said county, to make an examination of and inquiry into the mental condition of the plaintiff and to make report thereof to the court. On July 16, 1907, these doctors made a report on the inquiry, and among others they responded to questions as follows:

"In your opinion is the patient insane? *A.* Not at present, but with present surroundings he may be." "Is this the first attack? If not, when did others occur, and what was their duration? *A.* No; two years ago had an attack of nervousness." "What was the cause of this attack? *A.* Pleurisy and bad health." "Is the disease increasing or stationary? *A.* Increasing." "Are there rational intervals? *A.* Yes." "On what subject or in what way is derangement now manifested? State fully. Are there any permanent hallucinations or delusions? *A.* Continual strife with neighbor. No; nervous condition." "Has the patient shown any disposition to injure others? If so, was it from sudden passion or premeditation? *A.* Yes; premeditated when tormented." "Should the person be placed in temporary detention quarters, or be sent to an insane hospital or asylum for treatment? *A.* Sent to sanitarium for treatment."

The other inquiries answered have only a slight bearing, if any, on the existence of any fact or condition tending to show that plaintiff was insane.

At the conclusion of the testimony the court found that there was no evidence that the defendant *Henry A. Albers* had sustained adulterous relations with the plaintiff's wife

and this issue was withdrawn from the jury. It appeared, however, that the plaintiff for some time prior to the institution of the lunacy proceedings, when he published it, had secretly fostered the belief that such adulterous relations had existed for about twelve years; that he accused his wife of infidelity, spoke to her father, Mr. Heuer, about it, and to various persons at different saloons and to others on other occasions, and that he manifested ill will and a desire to do personal violence to *Dr. Albers,* being restrained therefrom through fear of the legal penalties consequent upon such action. It also appears that *Dr. Albers* advised with an attorney as to the proper and legal course to pursue under the circumstances; that his attorney instituted inquiries, and was credibly informed of plaintiff's attempt to secure evidence of secret visits by *Dr. Albers* to his home in his absence, and that, relying in part on the fact that he had observed a resemblance in one child's feet to those of the doctor, he had asserted that *Dr. Albers* was the father of his two oldest children.

The plaintiff testified that until 1901 he had employed the doctor as his family physician to treat all of the family, that the doctor had attended his wife at childbirth, and that he had taken special precautions lest the medicines prescribed by the doctor for him should have a poisonous effect upon him. It also appears that the defendants had all been informed of these facts, and that plaintiff had manifested an ungovernable temper, had a disposition toward secret anger, inducing him to violence, and that in view of his general demeanor his relatives and others informed thereof were apprehensive of actual harm. These mental states of the plaintiff and others of like nature were known to the defendants.

It appears that these facts were made known to Dr. McGovern by *Dr. Albers's* attorney, and that the doctor expressed his belief that the plaintiff was mentally deranged and that safety required that his mental condition be officially

ascertained to determine whether or not he ought to be committed to an asylum and receive treatment. The defendants were informed of Dr. McGovern's opinion in the matter. It is undisputed that the district attorney, the town chairman, and the county judge were all consulted, and that upon these facts they advised an inquiry into plaintiff's mental condition, and that the defendants were informed thereof before instituting the proceedings. The evidence sustains and corroborates these facts in the case. The record is barren of any evidence showing that the defendants acted without considering all these facts. It clearly tends to show that the defendants believed that they were true, and relying thereon instituted the proceedings to examine into plaintiff's sanity. Upon the whole evidence the inquiry is whether or not the defendants acted in good faith. Were the facts and circumstances of which the defendants were informed such as to justify the belief in the mind of a person of reasonable intelligence and prudence that the plaintiff was mentally afflicted? If the facts known to the defendants were received by them from sources entitling them to credit, and were of such a nature as to justify them as reasonably intelligent and prudent men in taking the steps they did to institute the inquiry as to plaintiff's mental condition, then they acted upon probable cause and were justified in taking steps to have his mental condition ascertained to determine whether or not he was insane.

In searching the evidence to ascertain whether or not the defendants had probable cause to institute the proceeding, and whether or not they acted from an honest motive in the matter, the fact that the court found that the evidence fails to show that the defendant *Albers* sustained adulterous relations with the plaintiff's wife has great weight. Treating this as a verity in the case, as we must upon the record, it lends substantial support to defendants' claim that the plaintiff displayed a state of mind indicating insanity. This fact

of itself places plaintiff in the position of charging his wife with adultery without foundation, and of persisting in the charge in a manner and to an extent which might well lead to suspicion of his mental soundness. The case, however, does not rest here. The defendants were also informed of plaintiff's singular and threatening conduct toward his wife and *Dr. Albers*. It appears that they submitted the facts and circumstances within their knowledge to a physician, an attorney, and the county judge, and received their confirmatory opinions that the plaintiff ought to be examined as to his sanity. Furthermore, the physicians appointed to examine the plaintiff as to his sanity reported to the effect that the plaintiff displayed a mental condition which evinced extreme nervousness which required treatment and might lead to insanity. This presents an array of persuasive facts and circumstances which would justify a person of reasonable intelligence and prudence in instituting an inquiry into plaintiff's sanity. The evidence of the case is without a basis for an inference that defendants acted without probable cause in procuring an inquest of plaintiff's mental condition. It is clearly insufficient to support the claim that the inquest was instituted for the malicious purpose of preventing plaintiff from testifying against *Dr. Albers* as to the alleged adultery. All the facts and circumstances harmonize in showing that the defendants acted on the belief that the plaintiff was mentally so afflicted as to require an examination as to his sanity, and that they instituted the inquest to have it judicially determined in good faith.

We are of the opinion that the court erred in refusing to grant defendants' motion for direction of a verdict in their favor, and in refusing to direct the jury to answer the tenth question of the special verdict—whether the defendants had probable cause to believe that plaintiff ought to be examined as to his sanity—in the affirmative, and in not awarding the defendants judgment in the case.

By the Court.—Judgment reversed, and the cause remanded to the trial court to change the answer to the tenth question in the special verdict from "No" to "Yes," and on the verdict as so corrected to award judgment in defendants' favor and against the plaintiff for the costs of the action.

ESTATE OF FERGUSON: JOYCE, Appellant, vs. RUSSELL, Respondent.

October 26—November 12, 1909.

(1) *Appeal: Review: Findings of fact.* (2–5) *Pension moneys: Exemption: Conversion into other property.*

1. Findings of fact which are not against the clear preponderance of the evidence are to be regarded as verities on appeal.
2. Under sec. 4747, R. S. of U. S., as construed by the federal supreme court, pension money is only exempt from claims of a pensioner's creditor while it is "due, or to become due, to any pensioner."
3. By such construction the words of the statute, "shall inure wholly to the benefit of such pensioner," relate to the words "due, or to become due," and have no force after the public obligation has been discharged by delivery of the money to the pensioner or his agent.
4. Whether *Folschow v. Werner*, 51 Wis. 85, holding to the contrary of the federal construction, should be adhered to, this court may properly decline to state, further than is necessary to facts as presented, requiring a decision.
5. Notwithstanding *Folschow v. Werner*, pension money, under the federal statute, is not exempt from claims of creditors of the pensioner after the money has been paid to him and converted into other property.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Proceedings, commenced in county court, to have certain premises declared a homestead under the statute regarding descent of real property, were removed by appeal from the

final order denying the petition to the circuit court for Waukesha county, and were closed by judgment affirming such order. The determination was based on these conclusions of fact: Appellant, an adult, is the sole heir at law of Catherine Ferguson, deceased. She resided in Missouri when said Ferguson died. Respondent is a general creditor of the deceased. The latter, when she died, was an inhabitant of Wisconsin. She did not leave a husband or any heir except appellant. There is no property available for payment of respondent's claim except that in question. The deceased became owner of the property about August, 1898. It consists of less than one-half acre of land, is situated within the corporate limits of Waukesha, and was not worth at the time Mrs. Ferguson died to exceed $900. At the time of acquiring the real estate, the deceased was about seventy-three years of age. She had, for twenty to thirty years, been a widow and, customarily, gone out to service for, and boarded with, numerous persons. At the time of such acquirement, she was a house employee in Pewaukee and so continued for over three years. In the meantime said property was wholly occupied by a tenant. After such period, she resided with her tenant on the property, as an ordinary boarder, for some over a year, and then boarded in another but nearby place till she died. She never resided upon the real estate, except as aforesaid, or at any time expressed an intention to make the place her homestead.

For the appellant the cause was submitted upon the brief of *D. J. Hemlock.*

For the respondent there was a brief by *Clasen & Walsh,* and oral argument by *E. D. Walsh.*

MARSHALL, J. The facts found warrant the conclusion that the premises in question never became the homestead of Catherine Ferguson. The findings are sufficiently supported by competent evidence to preclude their being condemned, in any respect, as erroneous. Therefore, the judgment must be

affirmed, unless the subject yet to be referred to is of controlling significance.

The point is made that the court erred in not deciding that the property was exempt from creditor claims against the estate of Catherine Ferguson, by reason of the same having been purchased with pension money which, under sec. 4747, R. S. of U. S. (U. S. Comp. Stats. 1901, p. 3279), was exempt, to the extent indicated in the language of the statute, as follows:

"No sum of money due, or to become due, to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remain with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

These proceedings were instituted, solely, to settle the controversy as to whether the property was subject to the law respecting descent of homesteads. That appears to be the sole subject of the decision in the circuit court. For that reason the question of whether the federal statute on the subject of the exemption of pension money could, in any event, cut any figure in the case, might properly be passed without decision. However, since such question will probably have to be decided in the course of the settlement of Mrs. Ferguson's estate, and has been argued on both sides, it is thought best to decide the same.

Counsel for appellant relies on *Folschow v. Werner,* 51 Wis. 85, 7 N. W. 911, where it was held, under the federal statute, that pension money after having been received by the pensioner, so long as the same can be identified as a fund in his hands for his use, is within the zone of exemption. The case did not go so far as to hold that the exemption would continue as to property purchased with the pension money, as in this case. Whether the decision could be justified on reason or authority limited, even, as it is, by the facts of the

case, is involved in very serious doubt as the following will show:

The supreme court of Iowa is the only court, so far as we can discover, which is in harmony with *Folschow v. Werner, supra.* It held to the contrary at first. *Webb v. Holt,* 57 Iowa, 712, 11 N. W. 658; *Triplett v. Graham,* 58 Iowa, 135, 12 N. W. 143; *Baugh v. Barrett,* 69 Iowa, 495, 29 N. W. 425; *Farmer & Sons v. Turner,* 64 Iowa, 690, 21 N. W. 140; *Foster v. Byrne,* 76 Iowa, 295, 35 N. W. 513, 41 N. W. 22. The court was divided on the subject during all the time covered by the decisions referred to. After the last of such decisions the personnel of the bench was changed, the two dissenting judges remaining and two of the majority being succeeded by new men. In the changed situation the question so many times decided, as indicated, was raised anew (*Crow v. Brown,* 81 Iowa, 344, 46 N. W. 993), and the previous cases were all overruled, the court holding that pension money received from the United States in the hands of the pensioner and property owned by him purchased therewith, as well, were exempt from the claims of creditors under the federal statute. The dissenting justices in their first dissenting opinion (57 Iowa, 712, 11 N. W. 658), relied for authority on *Eckert v. McKee,* 9 Bush, 355; *Hayward v. Clark,* 50 Vt. 612; and *Folschow v. Werner,* 51 Wis. 85, 7 N. W. 911. In their last dissenting opinion (76 Iowa, 295, 35 N. W. 513, 41 N. W. 22), which was referred to as expressing the judgment of the majority in *Crow v. Brown,* the sole authority cited was *Folschow v. Werner.* The Iowa court firmly adhered to its change of position (*Dean v. Clark,* 81 Iowa, 753, 46 N. W. 995; *Smith & Co. v. Hill,* 83 Iowa, 684 49 N. W. 1043; *Marquardt & Sons v. Mason,* 87 Iowa, 136, 54 N. W. 72; *Cook v. Allee,* 119 Iowa, 226, 93 N. W. 93), confessing, however, that it was against the great weight of authority (*Smyth v. Hall,* 126 Iowa, 627, 102 N. W. 520). The court was relieved from a somewhat embarrassing situa-

tion by a legislative enactment, following the judicial construction of the federal statute which had been adopted, thus effectually supplementing such statute.

It is interesting to note that the decision of this court, for authority, referred to *Eckert v. McKee,* relied on by the Iowa court. That case was overruled in 1875, six years before *Folschow v. Werner* was decided. See reference to *Wayne v. Chester* in *Robion v. Walker,* 82 Ky. 60. The opinion in *Wayne v. Chester* does not appear to have been published. The first published opinion of the Kentucky court, overruling *Eckert v. McKee,* is in *Robion v. Walker,* in which *Webb v. Holt,* 57 Iowa, 712, 11 N. W. 658, subsequently overruled in that state, as we have seen, was followed. The Kentucky court has adhered to its position, taken in 1875 as indicated, in many decisions reaching down to date. *Johnson v. Elkins,* 90 Ky. 163, 13 S. W. 448; *Curtis v. Helton,* 109 Ky. 493, 59 S. W. 745; *Sanders v. Herndon,* 122 Ky. 760, 93 S. W. 14.

The Vermont case relied upon, with the early Kentucky case, overruled as we have seen, and the case in this court based on such overruled decision, was decided in 1878, and long before the federal court had construed the federal statute. The Vermont court did not refer to any authority. The decision was not thereafter followed. All said in it, regarding the subject under discussion, was declared to be *obiter* in *Martin v. Hurlburt,* 60 Vt. 364, 14 Atl. 649, and, so far as it could be regarded, in any sense, as a construction of the federal statute, was overruled. It was likewise overruled in *Bullard v. Goodno,* 73 Vt. 88, 50 Atl. 544.

The following additional cases are in harmony with the later Kentucky and Vermont cases: *Rozelle v. Rhodes,* 116 Pa. St. 129, 134, 9 Atl. 160; *Friend v. Garcelon,* 77 Me. 25, 26; *Crane v. Linneus,* 77 Me. 59, 61; *Cranz v. White,* 27 Kan. 319; *State v. Fairton S. F. & B. Asso.* 44 N. J. Law, 376; *Faurote v. Carr,* 108 Ind. 126, 9 N. E. 350; *Spelman v. Aldrich,* 126 Mass. 113, 117; *Hissem v. Johnson,* 27 W. Va.

644, 652; *Stockwell v. Nat. Bank,* 36 Hun, 583; *Bull v. Case,* 41 App. Div. 391, 58 N. Y. Supp. 774; *Hathorn v. Robinson,* 96 Me. 33, 51 Atl. 236; *Martin v. Martin,* 187 Ill. 200, 58 N. E. 230; *Brown v. Balfour,* 46 Minn. 68, 48 N. W. 604; and *Recor v. Comm. & Sav. Bank,* 142 Mich. 479, 106 N. W. 82.

In many of the cases cited, *Folschow v. Werner* is referred to with disfavor. In no one of them, so far as we can discover, did the court have the benefit of a construction by the federal supreme court. Had such a construction existed at the time of *Folschow v. Werner* or the decisions which followed it in Iowa, and been called to the attention of the court, doubtless, such construction would have been followed. The subject seems to have been first presented to the federal supreme court in *McIntosh v. Aubrey,* 185 U. S. 122, 22 Sup. Ct. 561, where *Crow v. Brown,* 81 Iowa, 344, 46 N. W. 993, and *Yates Co. Nat. Bank v. Carpenter,* 119 N. Y. 550, 23 N. E. 1108, a similar case (based however on a statute—*People ex rel. Jones v. Feilner,* 157 N. Y. 363, 51 N. E. 1002), were condemned. *Folschow v. Werner* does not seem to have been cited to the attention of the court, else, doubtless, it would have met a similar fate. The decision of the federal court is in this plain language:

"The section of itself seems to present no difficulty. . . . We think the purpose of Congress is clearly expressed. It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to wit: when 'due or to become due.' From that situation the pension money," having been paid to the pensioner and converted into other property, ". . . had departed."

It follows from the foregoing that if *Folschow v. Werner* should be followed at all it should not be extended to cover the facts of this case, which are substantially identical with *McIntosh v. Aubrey, supra.*

By the Court.—Judgment affirmed.

ESTATE OF BACON: McMICHAEL and another, Appellants, vs. PETERMAN and others, Respondents.

October 26—November 12, 1909.

Wills: Construction: "Unmarried" persons: Public policy: Vested future interests.

1. A will bequeathed money in trust for the support of an insane son of testatrix, and provided that after his death the residue thereof be divided among her nieces "who may be unmarried at that date." At the death of the son six nieces of the testatrix were living, four of whom had never been married and two had been married since before the date of the will. *Held* that, applied to such situation, there could be no ambiguity in the word "unmarried."
2. Whether such bequest, by being in restraint of marriage and by offering inducement to the married nieces to become unmarried by divorce or otherwise, is so contrary to public policy as to be invalid, not determined. The married nieces not being shown to be next of kin or beneficially interested in the estate are not prejudiced by a decision of the circuit court holding the bequest valid.
3. It cannot be considered that such bequest gave a vested estate from testatrix's death to all the nieces (including those then married) as a class, with simply a condition subsequent divesting such interest in the event of marriage, and that such condition is void as against public policy. Under the terms of the will the married nieces were never members of any such class.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Clara M. Bacon made a will whereby, *inter alia,* she bequeathed to trustees certain sums of money to be invested by them and applied, both income and necessary portions of capital, to the support and comfort of testatrix's insane son, H. Noble Campbell, during his natural life. She then provided by the twelfth paragraph that, after the death of said son, "I desire that all the rest and residue in the hands of the trustees . . . be divided, share and share alike, to my nieces who may be unmarried at that date." The will was made

and testatrix died in July, 1906, and the son died May 29, 1908. The appellants, at the date of the will and at all subsequent times, were nieces of testatrix and married. The four respondents, other than *Estberg,* the trustee, are nieces of testatrix, and up to the present time have not married. The executors of the will presented their final account, which was allowed, and a final order distributing the estate, and incidentally construing the will, was entered in the county court prior to the death of the son. Appeal from that order was taken to the circuit court, there tried, after the death of the son, and an order entered construing the will and awarding the residue of said trust fund to the four unmarried nieces named as respondents. From that judgment this appeal is brought by the two married nieces.

V. H. Tichenor, for the appellants.

For the respondent *Mabel Peterman* there was a brief by *Frame & Blackstone;* for the respondents *Margaret Noble, Esther Noble,* and *Dorothy Noble* there was a brief by *T. W. Parkinson,* guardian *ad litem;* and the cause was argued orally by *H. J. Frame* and *M. A. Jacobson.*

Dodge, J. It is difficult to realize that there is any ambiguity in the portion of this will under discussion, to arouse a duty of construction. The gift is, in plain language, to such of testatrix's nieces as at the death of the son shall be unmarried. At that date the four respondents were nieces and were unmarried, and always had been, while the two appellants, albeit they were nieces, were not unmarried and had not been in a state of celibacy at any time since prior to the making of the will. Appellants contend that ambiguity lurks in the word "unmarried," because either of the nieces who were married at the date of will or of the testatrix's death might, before the death of the first beneficiary, terminate that marital status either by the death of her husband or by divorce, and, in that event, would have become unmarried,

a view that receives support from some decided cases, among others *Moyer v. Koontz,* 103 Wis. 22, 79 N. W. 50. Any such uncertainty in the meaning of "unmarried," however, can result in no ambiguity in applying the words of the will to the instant situation, for no once married niece had become unmarried within any possible meaning. It is too clear for debate that respondents are the persons designed by the will to receive this bequest and that appellants are not.

The next contention is that the confinement of this bequest to such nieces as should be unmarried at a date indefinitely subsequent to the testatrix's death was contrary to public policy in that it made it for the interest of each niece unmarried at that time to refrain from marriage through that indefinite period, and also that it offered a temptation to each niece who at that time was married to return to a state of celibacy by divorce or other elimination of her spouse, albeit such temptation has not proved effective in the present instance. Without at present discussing the question whether such method of selection of her beneficiaries would be so in contravention of public policy as to have invalidating effect, it suffices here to remark that these appellants have no interests which are prejudiced by the decision of the circuit court holding the bequest valid. They are not shown to have been the next of kin of testatrix or in any wise beneficially interested in her estate. They take nothing except by virtue of this bequest, and therefore lose nothing by refusal to hold it void.

Appellants further urge, however, that the bequest may be saved by considering that it gives a vested estate from the testatrix's death to all her nieces as a class, and that the effect of the restriction to those who may be unmarried at a subsequent date amounts merely to a condition subsequent serving, if valid, to divest such interest upon the event of marriage and, therefore, only the condition antagonizes public policy and is void, and not the bequest. We think, however, that

the premise of this argument is erroneous. Future interests are said to be vested when there is a person or a class of persons at all times existent to whom the future estate would immediately pass if the precedent estate terminated at any moment, although that class may change from time to time, individual members thereof dropping out, as by death, and other members coming in, as by birth. *Scott v. West,* 63 Wis. 529, 24 N. W. 161, 25 N. W. 18; *Webster v. Morris,* 66 Wis. 366, 384, 28 N. W. 353; *In re Moran's Will,* 118 Wis. 177, 189, 96 N. W. 367; *Williams v. Williams,* 135 Wis. 60, 65, 115 N. W. 342. Applying that test to the present situation it is obvious that the appellants were never members of any such class, for, clearly, they could not at any time since the death of the testatrix have received her bounty upon the death of her son according to the terms of the will. If this future estate was vested in a class, that class was made up at all times of the respondents, the unmarried nieces, although it might be enlarged by the birth of other nieces, or perhaps by the termination of the marital status of either of the two appellants, and any one of respondents might drop out in event of marriage or death. Hence it is still apparent that appellants lose nothing by the order appealed from and are not prejudiced thereby.

For these reasons, without considering others, the judgment cannot be reversed.

By the Court.—Judgment affirmed.

ROBERTS and others, Executors, Respondents, vs. WAUKESHA COUNTY and others, Appellants.

October 26—November 12, 1909.

Taxation: Reassessment after refund on void tax sale: Misdescription of land.

The power of the county board under sec. 1186, Stats. (1898), to direct a reassessment of the taxes justly chargeable upon lands when the original assessments were invalid because of irregularities in the tax proceedings, embraces all cases in which, under sec. 1184, by reason of the invalidity of the tax sales or certificates, the county is liable to refund the money paid to it, including a case where the land was misdescribed in the original assessment and the tax certificate, if the description was sufficient to enable the board to ascertain what land was actually attempted to be assessed.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The original plaintiff died after bringing the action and it was continued in the name of the present plaintiffs. June 17, 1892, the original plaintiff in this action became the owner of certain real estate situated in the S. ½ of section 3 and in the N. W. ¼ of section 10, town 8, range 20 E., in the village of Menomonee Falls, Waukesha county, Wisconsin. The deed conveying the property is recorded in volume 81 of Deeds, pages 551–554 inclusive, in the office of the register of deeds for Waukesha county, Wisconsin. In the assessment roll and the tax roll for the taxes of 1895 the lands are described as follows: "Owner, R. W. Roberts, SW pt SE ¼ SW ¼ and pt NW ¼ as per description in deed, Vol. 81, page 551, sec. 3–10, town 8, range 20." Instead of "as per description in deed, Vol. 81, page 551," the assessor used "as described in deed" in 1896, and "as per description in deed" in 1897. In the assessments of 1898, 1899, 1900, 1901, and 1902 no words referring to the deed were used in the description. In 1899 and thereafter "SW ¼" was also

omitted from the description as previously given, and in 1900 and thereafter instead of "NW ¼" the assessor used "S pt NW ¼."

The plaintiff paid no taxes upon his property for any of the years enumerated above. At the tax sales for the sale of lands for unpaid taxes for the various years enumerated, except the year 1902, tax certificates were issued according to the descriptions in the assessment and tax rolls. In 1902 the holder of the tax certificates issued in 1896, 1897, and 1898 on the sales for the unpaid taxes for 1895, 1896, and 1897, having discovered the misdescription, applied to the county board for a refund of the money paid for the tax certificates. The county board on December 2, 1903, ordered the refund, the cancellation of the tax certificates, and that the county clerk in the next apportionment of county taxes should include the sums refunded, with the interest allowed under the statutes, as a special tax to be collected from the land which should have paid the original tax. The misdescription in the assessment and tax rolls for the taxes of 1902 was discovered too late for the correction to be made in the assessment for that year, but the lands were withheld from sale at the tax sale in 1903 on this account. The assessment for 1903 included the taxes regularly assessed for that year, a reassessment of the taxes for 1902, and the taxes for the years 1895, 1896, and 1897 with the statutory interest. These taxes were not paid, and at the sale in 1904 the lands were sold to the county for the taxes and a tax certificate was issued to the county. On December 11, 1905, the county board ordered a refund of the taxes to the holders of the respective tax certificates of 1899, 1900, 1901, and 1902, and that the taxes so refunded, together with the statutory interest, should be levied as a special tax with the 1905 taxes upon the property of the plaintiff. The tax so levied was not paid, and at the tax sale in the succeeding year the lands were sold to the county for the taxes and a tax certificate issued to the county.

Plaintiff brought this action to restrain the issuance of tax deeds based on the tax certificates so held by the county. The trial court held that the orders of the county board ordering the reassessment of the taxes which were invalid for misdescription were invalid and void, and ordered the cancellation of the tax certificates. The court also prohibited the issuance of tax deeds based on the tax certificates on condition that the plaintiff pay the taxes levied for 1903 and 1905. This is an appeal from the judgment.

For the appellants there was a brief by *Milo Muckleston,* district attorney, and *V. H. Tichenor,* of counsel, and oral argument by *Mr. Tichenor.*

For the respondents the cause was submitted on the brief of *Goodrich & Goodrich.*

SIEBECKER, J. The trial court adjudged that the tax certificates issued on the sale of the plaintiff's lands under the tax sales for the unpaid taxes which the county board had directed reassessed under sec. 1186, Stats. (1898), should be canceled and that the county should be restrained from issuing tax deeds thereon. This decision was made upon the ground that the county board had no power to assess the amount of tax justly due and chargeable on the plaintiff's lands included in the reassessment, because such attempted reassessment was upon lands not embraced in the original assessment on which the county board had refunded the money paid to it on the sale of the lands for nonpayment of taxes, the proceedings being deemed invalid because of a defective description of the lands sought to be assessed. From the foregoing statement it appears that the lands assessed to the plaintiff in the original assessment and described in the tax certificates on the tax sales were so imperfectly described as to render the tax certificates issued on the tax sales for nonpayment of taxes invalid. Upon discovery of this condition it appears that the county board ordered and directed "that the money paid for such certificates on the sale and all

subsequent charges thereon" should be refunded with interest to the owner of the certificates upon delivery of the certificates for cancellation. These amounts were so refunded by the county.

It is conceded by both parties that the sole controversy on this appeal turns on the question whether or not the county board under sec. 1186, Stats. (1898), is given the power to make a reassessment under a correct description of the amounts of the taxes justly chargeable upon plaintiff's lands. There is no question but that the plaintiff's property is a proper subject for taxation within the taxing district of the original assessment and levy of the tax. It appears that the assessor intended to assess the lands to the plaintiff, and that an attempt was made to levy the amounts specified against the lands of the plaintiff by naming him as the owner of part of the lands in the two sections, but that the description of his real estate in the tax roll and the proceedings of the tax sale was an erroneous description of the lands plaintiff owned in government sections Nos. 3 and 10, lying in the village of Menomonee Falls. It also appears that the county board considered that the amount of the tax they so levied in their proceedings of reassessment was the correct and proper amount of the taxes justly chargeable on the plaintiff's lands embraced in the resolutions. The plaintiff's real estate consists of a very irregularly shaped piece of land situated in the village of Menomonee Falls in sections 3 and 10. It is not questioned but that the tax certificates issued on the sales for the nonpayment of the taxes prior to the reassessment were invalid because of the erroneous descriptions of the land on which the taxes were attempted to be levied. The respondents rest their right to restrain the county from proceeding to issue tax deeds on the tax certificates on the ground that the tax proceedings prior to the reassessment under the resolutions of the county board levied no tax upon their land because it is so defectively described as to render the tax sale

void, and it was on this account that the county board was compelled, under sec. 1184, Stats. (1898), to refund the money received on such sales with charges and interest. The question is: Can the county board, under the power and duties conferred by sec. 1186, Stats. (1898), direct that a tax be levied for the amount justly chargeable as a tax on plaintiff's real estate for the years embraced in the void assessment? It is averred that the county board has no such power in this instance because the county board can only direct an assessment of a tax, under this section of the statutes, when the lands "described in such certificate or deed were justly taxable for such tax or a portion thereof." The argument is that, since the lands described in the certificates in question do not describe plaintiff's lands, no assessment could be directed thereon. This contention is upon the ground that the county board is restricted in directing such an assessment to lands correctly described in the tax certificate or deed, and that errors in description cannot be corrected in such proceedings by the county board.

The powers conferred by the provisions of sec. 1186, Stats. (1898), must be considered in connection with the provisions of sec. 1184, Stats. (1898). These two sections of the statutes should, if reasonable, be so interpreted as to operate harmoniously. It is obvious that the legislature intended that the power of the county board under sec. 1186, Stats. (1898), to direct a reassessment of taxes upon lands in cases where the original assessments are invalid on account of irregularities in the tax proceedings, was to embrace all cases under sec. 1184, Stats. (1898), whereby the county is liable to refund the money paid it on account of the invalidity of a tax certificate or tax deed. The liability of the county to refund taxes for errors in description which make a tax void is not questioned, and we think properly not. Since the power of the county board to direct reassessments is to provide a tax in cases where the original levy fails for errors in the tax

proceedings, we perceive no reason why it does not embrace a case where a tax is void on account of a misdescription, and why it does not vest authority in the county board to correct such error.

It is argued that the descriptions embraced in the original assessments and the tax certificates are so defective as to make it impossible for the county board to determine that the plaintiff's lands were taxable for any amount. Though the descriptions in the original assessments and the tax certificates were so defective as to render the certificates invalid, yet it sufficiently appeared that the taxes were attempted to be levied upon lands owned by the plaintiff, by reference to his deed in some instances, and by reference to the government sections and parts thereof in all instances. We find that the original tax proceedings were sufficient to authorize the county board to ascertain what lands were actually attempted to be assessed and to direct the reassessment.

We cannot sustain the decision of the trial court holding that the county board was without power and jurisdiction in directing that the plaintiff's lands were legally taxable for the sums the board found to be just and proper taxes. The reassessments pursuant to the resolutions of the county board, and the issuance of the tax certificates on the sale of the plaintiff's lands for nonpayment of the taxes included in such reassessments, must be held to have been legally authorized. The tax certificates should not have been canceled, nor should the county and its clerk be restrained from issuing tax deeds on these tax certificates.

By the Court.—Judgment reversed, and the cause remanded to the lower court to award judgment dismissing the complaint.

SMITH, Appellant, vs. SMITH, Respondent.

October 26—November 12, 1909.

Indians: Heirship: Jurisdiction of state courts: Paternity of illegitimates: Evidence: Declarations of parents: Statutes: Construction.

1. In proceedings for administration of the estate of an Indian allottee of lands, the title to which was held in trust by the federal government, there being other property warranting the administration, the parties by stipulation submitted to the county court the question whether a certain person was the son and sole heir at law of the deceased. *Held*, sufficient to give the court jurisdiction.
2. The order or judgment of the court in such a case does not transfer the title or disturb the possession of the allotted lands; and the United States, as trustee, may recognize or refuse to recognize it as evidence, conclusive or *prima facie*, of heirship.
3. Under a federal statute (26 U. S. Stats. at Large, 794, ch. 383) making illegitimate children lawful heirs of their Indian father, paternity is to be established by a preponderance of evidence, and need not be established beyond reasonable doubt nor by evidence clear and convincing beyond reasonable controversy.
4. In such a case declarations of the deceased mother and of the alleged deceased father respecting the paternity of an illegitimate are competent, and when they are the best evidence the nature of the case will admit of, and are not overcome by other more convincing evidence, they are sufficient.
5. The construction given to the federal statute (26 U. S. Stats. at Large, 794, ch. 383) in *In re Heirs of House*, 132 Wis. 212, is adhered to.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *S. H. Cady* and *L. D. Jaseph.* Among other authorities they cited *Ott v. Boring,* 139 Wis. 403, 121 N. W. 126; *Busse v. State,* 129 Wis. 171, 108 N. W. 64; *In re Heirs of House,* 132 Wis. 212, 112 N. W. 27; sec. 2274, Stats. (1898); *Schiefelbein v. Fidelity & C. Co.* 139 Wis. 612, 120 N. W. 398; *Sufferling v. Heyl & Pat-*

terson, 139 Wis. 510, 121 N. W. 251; *Menn v. State,* 132 Wis. 61, 112 N. W. 38; *Baker v. State,* 47 Wis. 111, 2 N. W. 110; *Goyke v. State* (dis. op.) 136 Wis. 557, 117 N. W. 1027, 1126; *Hofer v. State,* 130 Wis. 576, 110 N. W. 391; *Grotjan v. Rice,* 124 Wis. 253, 102 N. W. 551; *Benedict v. Horner,* 13 Wis. 256; *Richmond v. State,* 19 Wis. 307; *Miller v. C. & N. W. R. Co.* 133 Wis. 183, 113 N. W. 384; *Kelley v. Crawford,* 112 Wis. 368, 88 N. W. 296.

M. E. Davis, for the respondent, cited *Jones v. Roberts,* 84 Wis. 465, 54 N. W. 917; *Gillett v. Treganza,* 13 Wis. 472; *State ex rel. Beals v. Probate Court,* 25 Minn. 22; Gary, Probate Law (3d ed.) §§ 630, 633.

TIMLIN, J. The county court of Outagamie county granted letters of administration upon the estate of Ezekiel Smith, an Indian, to *Hattie C. Smith,* his widow, and thereafter it was stipulated, prior to the time for final distribution, that the question whether *Taylor Smith* was the son and sole heir at law of decedent should be tried before said county court at a time and place stated. We are informed by counsel that the department of the United States government having charge of Indian affairs until recently approved, recognized, and acted upon this mode of ascertaining Indian heirs for the purpose of identifying the person or persons for whom the United States held the title in trust. The county court heard the evidence and determined that *Taylor Smith* was the son of decedent, but that *Hattie C. Smith* was his widow and sole heir. An appeal was taken to the circuit court from this order and the place of trial changed to Brown county, where, after a trial of the question, the circuit court found that Ezekiel Smith, deceased, was an Oneida Indian, an allottee of lands in the Oneida Indian reservation in this state, and held a trust patent from the United States for two quarter-quarter sections of such land, and that *Taylor Smith* was the illegitimate son of said Ezekiel and one Dolly Hill, de-

ceased, but that the said Ezekiel and Dolly never cohabited as husband and wife according to the custom and manner of Indian life, and Ezekiel never admitted in writing that *Taylor* was his son.

From these facts the circuit court concluded that *Taylor Smith* was the heir at law of Ezekiel Smith, deceased, and as such was entitled to the entire interest of said Ezekiel in and to the lands in question, subject to the dower and homestead rights of *Hattie C. Smith,* widow of decedent. An order was then made in the form of judgment remitting the cause to the county court of Outagamie county with directions to enter the proper order assigning to *Taylor Smith* the entire interest of Ezekiel Smith in and to the lands in question, subject to the dower and homestead rights of *Hattie C. Smith.* Upon appeal to this court from the order last mentioned *Hattie C. Smith* assigns error: (1) That the court erred in exercising jurisdiction; (2) that the court erred in finding *Taylor Smith* was the son of Ezekiel; (3) in admitting evidence of declarations of Dolly Hill; (4) in limiting cross-examination; (5) in admitting parol declarations of Ezekiel Smith as to his paternity of *Taylor Smith;* (6) in the conclusion of law that *Taylor Smith* is the heir of Ezekiel Smith.

No objection to the jurisdiction of the circuit court appears to have been made in that court, but appellant cites in this court the case of *McKay v. Kalyton,* 204 U. S. 458, 27 Sup. Ct. 346, in support of the first assignment of error. In that case, however, the action was one to recover possession of or title to the allotted land, or both such possession and title. This is not true of the instant case. Here the parties have by stipulation and mutual consent submitted to the state court the question of whether a certain person was the heir at law of Ezekiel Smith. The order or judgment does not transfer the title to or disturb the possession of the land in question. *Jones v. Roberts,* 84 Wis. 465, 471, 54 N. W. 917; *Gillett v.*

Treganza, 13 Wis. 472; Gary, Prob. Law (3d ed.) §§ 630, 633. And the United States as trustee may recognize, or refuse to recognize, this order as evidence conclusive or *prima facie.* Act Cong. Feb. 8, 1887, ch. 119, 24 U. S. Stats. at Large, 388, as amended by Act Cong. Feb. 28, 1891, ch. 383, 26 U. S. Stats. at Large, 794, 3 Fed. Stats. Ann. pp. 493, 494, 496, 501, 502. There was other property of Ezekiel Smith besides the trust lands which authorized the administration.

We perceive no valid ground for saying that the state court had no jurisdiction to make the order in question. Probably if *Taylor Smith* seeks to recover the possession or enjoyment of the land in question, or of its proceeds, against an adversary claimant, notwithstanding this determination, he must proceed in the federal court. But that question is not directly involved in the present appeal. It is sufficient that the state court, in an administration proceeding properly brought and upon stipulation of the parties, determined the status of *Taylor Smith* as heir of Ezekiel Smith, and that the government of the United States may through its departments primarily, or its federal courts finally, determine that in the discharge of its trust it will or will not recognize this decision as evidence.

We consider the finding that *Taylor Smith* is the son of Ezekiel Smith is supported by considerable evidence and not against the clear preponderance of the evidence. The question was one of pedigree or heirship and not of legitimacy. The statute made illegitimate children lawful heirs, and the real inquiry was directed to the fact whether or not *Taylor Smith* was a son of Ezekiel Smith. The result of the investigation was not to put a bar sinister upon his shield, but rather to find him to be one worthy to inherit. Therefore paternity is to be proven by a preponderance of evidence, and not by evidence establishing it beyond a reasonable doubt nor by evidence clear and convincing beyond reasonable controversy.

It is true that evidence of declarations by the deceased mother of the illegitimate respecting his paternity and like declarations of the alleged father of the illegitimate are not very satisfactory evidence, but they are the best evidence the nature of the case will admit of, and competent upon the question of pedigree. When they are not met and overcome by other more powerful, credible, and convincing evidence they must be held sufficient to form a basis for belief or mental conviction. 1 Elliott, Ev. ch. 16, §§ 360–382.

Appellant assails as incorrect the construction given to the statute (3 Fed. Stats. Ann. sec. 5, p. 501) in *In re Heirs of House,* 132 Wis. 212, 112 N. W. 27, and asks us to overrule that case. He suggests that the construction given to the federal statute might result in enabling illegitimates of the second class in some cases to inherit from both the father and the mother, while the more worthy illegitimates of the first class would inherit from the father only. This consideration, while of weight, is not sufficient to overcome the otherwise clear meaning of the statute. No other construction which we consider reasonable or satisfactory is suggested, and we therefore adhere to that already placed upon the statute. We may not agree with the wisdom or policy of a statute which, amongst a simple or primitive people, makes such bastardy a privilege or advantage, and which stirs the recollection or the imagination of old people concerning casual errors or irregularities long since forgotten or which never happened, by offering the prize of an inheritance to such illegitimate children. But all this is more properly addressed to the federal legislature and cannot be taken to divert or distort the plain meaning and sense of this statute. We perceive no error in the rulings admitting or excluding evidence, and affirm the judgment.

By the Court.—The judgment of the circuit court is affirmed

LE BLOND, Appellant, vs. TOWN OF PESHTIGO and others, Respondents.

October 26—November 12, 1909

Equity: Injunction: Grounds of relief: Irreparable injury: Multiplicity of actions: Adequate remedy at law: Pleading construed: Ejectment: Easements.

1. Plaintiff alleged that defendants, a town and its supervisors, wrongfully entered upon a strip of plaintiff's land and constructed a highway and drain thereon, to her damage; that they have continued unlawfully to use the land thus appropriated, and threaten that if plaintiff attempts to fence up said highway and drain they will tear down the fences and continue to use the same; that they have permanently deprived plaintiff of the use and enjoyment of that portion of the premises appropriated by them; that plaintiff has suffered irreparable injury and will be put to the necessity of bringing a multiplicity of suits to protect her rights. The relief asked was that defendants be enjoined from taking possession or attempting to take possession of the strip of land in question and from interfering with plaintiff's enjoyment, use, and occupation thereof, and for damages. *Held*, that the facts stated did not entitle plaintiff to the interference of equity to prevent either irreparable injury or a multiplicity of actions at law.
2. The averment that plaintiff has been permanently deprived of the use and enjoyment of the strip of land in question is construed as equivalent to a statement that she has been deprived of the possession of said strip; and it appearing that what she seeks to recover is the possession of the land, not of a mere easement over it, she has an adequate remedy at law in an action of ejectment.
3. Where the owner in fee has been wrongfully deprived of the possession of land he may maintain ejectment to recover that possession, and it is immaterial whether such deprivation has been caused by the exercise of an easement which wrongfully excluded him from possession, or otherwise.
4. Where land has been wrongfully taken for a highway, and the only right which the owner may exercise over it is the right to use it as a highway in common with all others, he has been deprived of his possession.

APPEAL from an order of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint.

The complaint, in substance, charges that the town of *Peshtigo* is one of the duly organized towns of Marinette county, and that the other defendants are, and at all the times mentioned in the complaint were, the duly elected, qualified, and acting supervisors of said town; that the defendants during the month of August, 1905, entered upon certain lands owned by and in the possession of plaintiff and tore down fences, cut and removed valuable timber, and constructed a highway and drain thereon at a cost of $500, which was paid by the defendant town; that said defendants never acquired any right by consent of the plaintiff or otherwise to appropriate any portion of her land; and that she has been damaged in the sum of $900 by reason of the unlawful act complained of. The complaint further sets forth that ever since August 12, 1905, defendants have continued to unlawfully use the premises appropriated for a drain and public highway, and that certain of the defendants threaten and assert that if plaintiff attempts to fence up the pretended drain and highway they will tear down such fences and obstructions and continue to use the same, and that said defendants have ever since the 12th day of August, 1905, permanently deprived the plaintiff of the use and enjoyment of that portion of the premises appropriated by the defendants, and that plaintiff fears the defendants will carry out the threats aforesaid, and will harass, vex, and annoy the plaintiff, and that plaintiff has been put to irreparable injury, and will be put to the necessity of bringing a multiplicity of actions to protect her rights. By way of relief plaintiff asks that the defendants, their agents and servants, be enjoined and restrained from taking possession or attempting to take possession of the strip of land in question, and also from in any manner interfering

with the enjoyment, use, and occupation thereof by the plaintiff, and that plaintiff recover $900 damages done and suffered by reason of the unlawful acts complained of.

One of the grounds of demurrer was that the complaint did not state facts sufficient to constitute a cause of action. This is the only ground relied on to sustain the order appealed from.

For the appellant there were briefs by *L. M. Nelson,* attorney, and *P. A. Martineau,* of counsel, and oral argument by *Mr. Martineau.*

For the respondents there was a brief by *W. B. Quinlan,* and oral argument by *H. T. Scudder.*

BARNES, J. By her complaint the plaintiff seeks to recover possession of her property and damages for the wrongs she has sustained. If, under the facts stated, she is not entitled to resort to a court of equity to secure this relief, then the demurrer was properly sustained. As a general proposition equity will not interfere to prevent a mere threatened trespass unless such trespass will work irreparable injury. Where, by reason of the continuous character of the invasion, numerous actions at law would be necessary, equity will interfere to prevent a multiplicity of suits because the legal remedy is inadequate. *Miller v. Hoeschler,* 121 Wis. 558, 99 N. W. 228. Sufficient facts are not stated in the complaint to bring it within the principle of the case cited. Neither are the necessary facts stated to bring it within the decision of this court in *Flanders v. Wood,* 24 Wis. 572; *Church v. Joint School Dist.* 55 Wis. 399, 13 N. W. 272; *Smart v. Hart,* 75 Wis. 471, 44 N. W. 514; *Ruhland v. Jones,* 55 Wis. 673, 13 N. W. 689; *De Pauw v. Oxley,* 122 Wis. 656, 100 N. W. 1028; and *McCord v. Eastern R. Co.* 136 Wis. 254, 116 N. W. 845, in all of which cases equity jurisdiction was sustained. The complaint does not allege that any particular injury or mischief will result from any threatened in-

jury by the defendants during the pendency of the action, and no temporary restraining order is sought. There is no averment in the complaint from which it could be inferred that the pleader desired any relief except to be restored to possession and to recover damages sustained prior to the institution of the suit. The single allegation relied on to bring the case within the rule that equity will take jurisdiction where it is necessary to do so to prevent a multiplicity of suits is that certain defendants threaten and assert that if plaintiff fences up the highway they will tear down the fence and continue to use and occupy the same, and that plaintiff will be put to the necessity of bringing a multiplicity of actions to protect her rights. This allegation, construed in connection with the relief prayed, is insufficient to make a case in equity unless it can be maintained on some other ground.

It is urged, however, that the action is brought to recover an easement only, and that ejectment will not lie where such recovery is sought, and that the plaintiff has no adequate remedy at law. It is clear that a mere action for trespass would not furnish an adequate and complete remedy, and, if it be true that the complaint does not state the necessary facts to constitute a cause of action in ejectment, the plaintiff has planted her suit in the proper forum. Sec. 3074, Stats. (1898), prohibits recovery by ejectment unless the plaintiff at the time of commencing the action has a valid, subsisting interest in the premises claimed and a right to recover the same or the possession thereof, or of some share or interest in a portion thereof to be proved and established in the action. Sec. 3077, Stats. (1898), provides that the complaint in an action of ejectment shall set forth that the plaintiff has an estate or interest in the premises claimed, and shall state the nature and extent of such interest, whether in fee, dower, for life, or for a term of years, and that he is entitled to the possession of such premises, and that defendant unlawfully withholds the possession thereof from him. Sec. 3075, Stats.

(1898), provides that the action of ejectment must be brought against an actual occupant of the premises claimed, if occupied, and, if not so occupied, then it must be brought against some person exercising acts of ownership in the premises claimed, or against some one claiming title thereto or some interest therein. Sec. 3084, Stats. (1898), requires that the verdict rendered in an ejectment action (if for the plaintiff) shall specify the estate established by the plaintiff on the trial, "whether it be in fee, dower, for life or for a term of years."

The complaint before us shows ownership in fee by the plaintiff, wrongful entry and occupation by the defendants, and permanent deprival of the use and enjoyment of the strip of land appropriated. Every essential fact necessary to state a good cause of action in ejectment under sec. 3077, Stats. (1898), is to be found in the complaint. We construe the averment that plaintiff has been permanently deprived of the use and enjoyment of the strip of land in question as tantamount to a statement that she has been deprived of the possession of such strip. The complaint, however, does show that defendants entered upon the land for the purpose of building a highway and drain, and that the same were built, and that the highway has since been in use. Is the plaintiff suing to recover the possession of the land or for the recovery of a mere easement over it, and, if the latter, will ejectment lie? These are the vital questions involved in determining whether the complaint is fatally defective.

In *Gardiner v. Tisdale,* 2 Wis. 153, and in *Weisbrod v. C. & N. W. R. Co.* 21 Wis. 602, it was held that the owner in fee of a street could maintain ejectment against an incumbrancer or occupier inconsistent with or repugnant to the purpose of a public easement. In *Racine v. Crotsenberg,* 61 Wis. 481, 21 N. W. 520, the defendant took possession of what was claimed to be a public alley and appropriated the same to his own exclusive use. Ejectment was brought to recover

the easement which the public had in such alley. It was held that ejectment would not lie to recover a mere incorporeal right, and that it would only lie to recover things corporeal which might be the subject of seisin, entry, and possession. It was further held that secs. 3077, 3084, Stats. (1898), were not broad enough to give the plaintiff a right of action, because the plaintiff had no estate "in fee, dower, for life or for a term of years" in the real property sought to be recovered, as the statute required. This case is not authority to the proposition that where the owner of the fee is excluded from the possession of his land by the use of an easement over the same he may not recover such possession in ejectment. On the contrary, the case, inferentially at least, holds that such an action would lie. *Fritsche v. Fritsche,* 77 Wis. 270, 45 N. W. 1089; *Maurer v. Stiner,* 82 Wis. 99, 51 N. W. 1101; and *Buckner v. Hutchings,* 83 Wis. 299, 53 N. W. 505, were actions where the plaintiffs sought to recover or to be restored to the right to use and enjoy a mere easement over lands to which they had no title or right of possession, nor any right whatever except to use and enjoy an easement over the same. The plaintiffs, therefore, were not the owners of such an interest in the fee as would bring them within the terms of sec. 3077, Stats. (1898). In *Lawe v. Kaukauna,* 70 Wis. 306, 35 N. W. 561, the plaintiff, who claimed an estate in fee, brought ejectment to recover certain lots which the city occupied and used for the landing of a swing bridge and in connection with a street leading to the same. It was held that ejectment was not only a proper remedy but was the only adequate one. The value of this case as a precedent is minimized by the fact that the question presently under discussion was not raised or considered by the court, and by the further fact that the case has been to some extent distinguished in *Pinkum v. Eau Claire,* 81 Wis. 301, 51 N. W. 550.

The only other case in this court bearing on the question is

the one last referred to—*Pinkum v. Eau Claire.* There the grantors of the plaintiff conveyed on condition to the city of Eau Claire an easement over certain lands for the purpose of constructing a canal in consideration of certain reciprocal rights and privileges to be conferred on the grantor, the principal one being that the city should erect a certain highway which would give the grantor access to a stone quarry. The action was brought in equity, and, among other relief sought, the plaintiff asked for a decree commanding the city to proceed at once with the construction of the highway and compelling its maintenance thereafter, and that in case of default on the part of the city in this regard the grant be annulled, vacated, and set aside, and that the cloud created by the deed of grant be removed, and that the defendant be required to remove all obstructions which it had placed and then maintained upon the premises, and that plaintiff be put in possession thereof. It was urged that plaintiff had an adequate remedy by ejectment. The court treated the action as one brought to recover the easement formerly granted, and held that "ejectment is not the appropriate remedy for the recovery of a mere easement." In the *Pinkum Case* the thing conveyed was an incorporeal right, and what the plaintiff sought to do was to nullify the grant and recover back the thing granted in case he could not compel specific performance.

An easement is an incorporeal right which can only be acquired by grant or prescription, and is incapable of manual delivery. Land, on the contrary, is a tangible thing of which actual possession may be delivered. There is a substantial distinction between an action brought to recover an intangible right and one brought to recover actual manual possession of real property which has been lost to the owner by the exercise of an incorporeal right or in any other way. In the one case possession of the thing sought cannot be delivered through a court of law; in the other it may. Here what the plaintiff

seeks to recover is not the possession of some mere right or easement, but possession of a distinct part and parcel of her farm. Where, as here, the owner in fee has been deprived of the possession of real estate, the statute gives a right of action in ejectment to recover that possession, and it is immaterial whether the deprivation of such right has been caused by the exercise of an easement which wrongfully excluded plaintiff from her possession, or otherwise. If the only right plaintiff can now exercise over the strip of land in question is the right to use it as a highway in common with all others, then she has been deprived of her possession. *Strong v. Brooklyn,* 68 N. Y. 1. And the allegation of the complaint, which on demurrer must be taken as true, is that plaintiff has been deprived of the use and enjoyment of her property, and not of a mere easement over the same.

By the Court.—Order affirmed.

WINSLOW, C. J., dissents.

FARRELL, Respondent, vs. PHILLIPS, Appellant.

October 27—November 12, 1909.

(1, 2) *Larceny: Negotiable note: Felonious intent: Taking by trick.* (3, 4) *Malicious prosecution: Probable cause: Special verdict: Omitted finding: Appeal: Presumptions.* (5) *Witnesses: Credibility: Conviction of contempt of court.*

1. Although the maker of a negotiable note had perhaps a right to rescind, for failure of consideration, an entire contract as part of which such note was executed and delivered, yet, until such rescission at least, the note was the property of the payee and was subject of larceny.
2. A felonious intent to deprive the possessor of the thing taken being essential for larceny, if one openly takes property under the honest though mistaken belief that he himself has title,

the act ordinarily will not be larceny; but the claim of title must be at least colorable and be made in entire good faith. A taking by artifice or fraud or accompanied by acts of concealment will raise a strong inference of felonious intent.

3. In an action for a malicious prosecution of plaintiff for larceny of a note, it appeared that the note was given by plaintiff to defendant as part of an entire contract providing for the renting of a building and assignment of a liquor license by defendant to plaintiff; that defendant had no such license; and that plaintiff, without rescission of the contract for failure of consideration, had by a trick got the note from defendant's possession and carried it away. *Held*, that defendant had probable cause for the prosecution.

4. In an action for malicious prosecution the special verdict did not contain any finding as to whether or not there was probable cause for the prosecution, but judgment was rendered thereon for plaintiff. *Held*, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), the case must be treated on appeal as though the court had found as a fact that there was lack of probable cause and appellant had excepted to the finding.

5. Contempt of court, either civil or criminal, is not a "criminal offense" within the meaning of sec. 4073, Stats. (1898), which permits "conviction of a criminal offense" to be proved to affect the credibility of a witness, either by the record or by cross-examination.

6. Where, under sec. 4073, Stats. (1898), the credibility of a witness is sought to be affected by proving by the record his conviction of a criminal offense, such proof should consist of the record of the conviction and judgment alone, and not the full record of the case.

7. A single isolated act of contempt of court committed twelve years prior to the trial does not properly come within the rule which permits, upon cross-examination, inquiries into the previous life, habits, and occupation of a witness, as tending to throw light on his veracity.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Phillips commenced a criminal prosecution against *Farrell* for the larceny of a promissory note, and, the prosecution being dismissed by the examining magistrate, *Farrell* brought this action for malicious prosecution. *Phillips's* defenses were that the plaintiff actually committed the larceny and that he (*Phillips*) acted on the advice of counsel.

Most of the facts were undisputed. The defendant, *Phillips,* in April, 1908, owned a building in the city of Oconto which he desired to rent for saloon purposes. Prior to May 16th he had deposited $200 with the city clerk and applied for a license for the balance of the license year, but had received no license because the city council had not met. On the 16th of April he met *Farrell,* and after some talk an arrangement was made by which *Farrell* was to lease the building and operate a saloon in it at an agreed rental, and was to give his note indorsed by a responsible indorser for half the city and government license, amounting to $112, *Phillips* paying the other half. At this point arises the only serious dispute as to the facts. *Farrell* claimed that *Phillips* said he already had the city license and would assign it to him, while *Phillips* claims that he only told *Farrell* that he had applied for the license and deposited the money and would have it issued to him (*Farrell*). On the same day the oral arrangement was so far carried out that the lease was drawn in duplicate and a copy delivered to each party, a negotiable note for $112, with the indorsement of one Dr. Watkins, was signed by *Farrell* and delivered to *Phillips,* and the key of the building delivered to *Farrell.* Upon the following morning *Farrell* called at *Phillips's* house and asked *Phillips* to let him see the note to see if it was all right, and *Phillips* handed him the note, and *Farrell* secretly and without *Phillips's* knowledge substituted for the indorsed note his own note, without indorsement, and handed it to *Phillips,* who did not discover the substitution until afterwards. *Farrell* claimed that he had ascertained that *Phillips* had no license, and that he was afraid that *Phillips* was not going to deal fairly with him, and so he determined to get his note back and call the deal off. Nothing further was done towards carrying out the contract. *Farrell* left Oconto the next day, and *Phillips* immediately made sworn complaint against him for larceny of the note.

The jury returned a special verdict finding: (1) That *Phillips* maliciously procured *Farrell's* arrest; (2) that the agreement between the parties was that *Phillips* would assign to *Farrell* a license which he then claimed to have, and that this agreement was the consideration for the note in question; (3) that *Phillips* did not make a full, fair, and honest statement of the material facts to an attorney before the prosecution commenced; (4) that *Phillips* did not sincerely and in good faith believe when he swore out the warrant that the plaintiff was guilty of larceny; and (5) that plaintiff's damages amounted to $2,335.77, of which sum $2,000 were punitory damages.

The court gave defendant the option to consent to judgment for $935.77 within twenty days, and, in the event of failure to exercise the option, gave plaintiff the option to take judgment for $635.77, and ordered that if neither option should be exercised the verdict be set aside and a new trial granted. The defendant did not exercise its option, but the plaintiff chose to take judgment for $635.77, and from that judgment the defendant appeals.

For the appellant there was a brief by *F. X. Morrow* and *Sheridan & Evans,* and oral argument by *W. L. Evans.*

Allan V. Classon and *D. D. Conway,* for the respondent.

WINSLOW, C. J. In order to sustain an action for malicious prosecution it must appear: (1) That the defendant commenced a prosecution; (2) that it has terminated in the plaintiff's discharge; (3) that it was commenced maliciously and (4) without probable cause. In this case the first two facts were admitted, and the contest was as to the third and fourth propositions. By their verdict the jury found malice, but did not find lack of probable cause, so the verdict on its face seems to omit an essential fact.

It appears that the trial judge considered that when the

jury, by its second finding, found that the agreement was that *Phillips* was to assign to *Farrell* a license which he then had, in consideration for the indorsed note, it was in effect found that the note was without consideration and of no value, and hence that no larceny was committed in taking it, and that if there was no larceny then there could be no probable cause. We are unable to agree with this conclusion. The note had been fully executed and delivered. It was part of an entire contract which included the rental of the building as well, and cannot be considered as standing alone or based upon an entirely separate consideration. It was negotiable on its face, and there was nothing to prevent its holder from negotiating it, thus relieving it from the defense attempted to be made. It was property, and it was the defendant's property, at least until a rescission of the contract had been made. The fact that there was a defense claimed to exist which might be successful at the end of a lawsuit did not deprive it of its character as property nor justify the maker in taking it from its owner by force or stratagem. If such were the rule, the mission of the courts in the settlement of disputes as to the ownership of property would seem to be at an end. These propositions do not seem to call for the citation of authority in their support. They are self-evident. So the verdict still remained insufficient because it nowhere found the want of probable cause. At this point, however, sec. 2858*m*, Stats. (Laws of 1907, ch. 346), comes in. This section provides that:

"Whenever any special verdict shall be submitted to a jury, and there is omitted therefrom some controverted matter of fact, not brought to the attention of the trial court by request, but essential to sustain the judgment, such matter of fact shall be deemed determined by the court in conformity with its judgment, and the neglect or omission to request a finding by the jury on such matter shall be deemed a waiver of jury trial *pro tanto* and a consent that such omitted fact

be determined by the court. The finding or determination of such omitted fact by the court may be reviewed on appeal without any exception thereto."

No claim is made that this law is unconstitutional or ineffective for any other reason, and we have discovered no reason why it should not be enforced as it reads. We must therefore treat the case as though the court had found as a fact that there was lack of probable cause and the appellant had excepted to the finding.

Is the finding against the clear preponderance of the evidence? We think it is. Upon the plaintiff's own version of the transaction by which he obtained possession of the note we think it affirmatively appears that the defendant had probable cause to believe the plaintiff guilty of larceny. As we have seen, the note in question was the property of the defendant and had value. The plaintiff's own story shows that without rescinding or attempting to rescind the contract, of which the note was a part, he took the note from its owner's possession by a fraudulent and secret trick and returned it to its indorser. Of course the felonious intent to deprive the possessor of the thing taken must be present in order to constitute larceny, and, if a man openly take property under the honest though mistaken belief that he himself has title, the act ordinarily at least will not be larceny. But in order that there should be an acquittal on this ground it is essential that the claim of title be at least colorable and that it be made in entire good faith. If the taking be not open, but be accomplished by artifice or fraud, or be accompanied by acts of concealment such as were present here, the inference will be strong that the felonious intent was present. 1 Wharton, Crim. Law (10th ed.) §§ 883, 884; *State v. Bond,* 8 Iowa, 540.

Upon the facts admitted here no court would be justified in taking the question of defendant's guilt from the jury, and a verdict of guilty could not be set aside. It follows

necessarily that the defendant had probable cause to commence the prosecution for larceny, and that the finding to the contrary, implied by the statute, must be set aside as contrary to the clear preponderance of the evidence.

While this necessitates reversal of the judgment and a direction to enter judgment dismissing the complaint, we deem it proper to notice a ruling upon evidence which was fully argued. Upon the defendant's cross-examination he was asked whether he had not been convicted and fined for contempt of court twelve years previously, during the trial of an action to which he was a party; such contempt consisting in treating a juryman in a house of ill-fame. The defendant not being willing to admit the fact that the alleged treating was done in a house of ill-fame, the plaintiff was allowed to read in evidence the entire record in the contempt proceeding, from the complaint to the judgment, as a part of the cross-examination. We think this was erroneous for at least two reasons: *First,* the statute allows the "conviction of a criminal offense" to be proven to affect the credibility of a witness, either by the record or by cross-examination of the witness (sec. 4073, Stats. 1898), and conviction of a contempt of court, either civil or criminal, is not a conviction of a "criminal offense," as very plainly appears from the provisions of sec. 2569, Stats. (1898), which expressly provides that persons punished for contempt even criminally shall still be liable to indictment or information for the offense. *Second,* even if it were proper under the section named to prove conviction for contempt of court by the record, the proof should consist of the record of the conviction or judgment alone, and not the full record of the case, which may well contain matters and charges derogatory in their nature, well calculated to prejudice the jury, but which in fact are no part of the judgment and may never have been proven.

It is said that the evidence was proper under the general rule that upon cross-examination inquiries into the previous

life, habits, and occupations of a witness may be properly allowed in the discretion of the trial court, as tending to throw light on his veracity. *State v. Nergaard,* 124 Wis. 414, 102 N. W. 899. The line is sometimes difficult to draw in this field, but we are satisfied that a single isolated act of contempt of court, committed twelve years prior to the trial, does not properly come within the rule. It can hardly be said to give character to the life of the witness, and furthermore its remoteness in point of time should bar its admission.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

KOENIG, Appellant, vs. KOENIG, Respondent.

October 27—November 12, 1909.

Pleading: Evidentiary matter: Contracts: Support of parent: Compensation: Evidence: Questions for jury.

1. Where, in an action against plaintiff's sister to recover the value of services rendered and expenses incurred at her request in supporting her father, the complaint, after stating that cause of action, further alleged that defendant, in consideration of the support of her father, had received by his will his entire estate, and that she had failed personally to support him, but had engaged plaintiff to do so for her, which he did as before stated, these last allegations were properly stricken from the pleading as being a relation of mere evidentiary circumstances.
2. Evidence in such case that defendant had received or been promised her father's property as consideration for supporting him before she requested plaintiff to do so, would have been competent as tending to show a mutual understanding that she would compensate plaintiff; but mere statements made by plaintiff on his cross-examination (which were properly stricken out because not responsive to any question) that he expected pay from defendant because she got the father's property, would not, if they had remained in the case, have tended to show

that defendant received the property pursuant to any promise made before said request.

3. The mere facts that a son was requested by his sister to support their father; that he did so for twelve years without suggesting, until after the father's death, that he expected compensation from the sister; that the sister received by the will the father's property; and that the son claimed compensation out of the father's estate,—were not sufficient to carry to the jury the question whether there was an agreement or understanding that the sister was to compensate him.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action to recover, on contract, the reasonable value of plaintiff's services and expenditures in supporting his father. The action was against a sister upon the theory that she became obligated to the father to support him by reason of his having agreed to make her his heir, and that she employed plaintiff to aid her in satisfying her obligation, which he did, rendering the services and incurring the expenses in question.

Following the statement of a cause of action, in general terms, to recover for the reasonable value of services rendered and for expenses incurred by plaintiff at the request of defendant, the complaint contained a paragraph to the effect that defendant, in consideration of support of her father, received by his will his estate valued at $3,500; that she failed to personally render the service and engaged plaintiff to do so in her stead, which he did, as stated in the general declaration of his cause of action.

Defendant joined issue on all allegations of the complaint, except as to the relationship of the parties, and that plaintiff aided in supporting the father.

On motion, the added paragraph of the complaint, above mentioned, was stricken out as surplusage.

There was evidence to this effect: In 1896, plaintiff, a miller by trade, and a married man, was residing in a home

of his own. The father of plaintiff and defendant possessed a competency and boarded at a hotel, his expenses being paid by defendant. In such situation, in October, 1898, plaintiff visited defendant, by her written invitation. She then informed plaintiff that the care of her father was too much of a burden for her and requested him to assist, which he consented to do. The father was present and assented to the arrangement. Following that, for a period of some twelve years, terminating with death of the father, he resided with the plaintiff and was supported and cared for by him, without making any claim upon defendant therefor in the meantime. There was further evidence that plaintiff expected defendant to pay for the service because she asked him to perform it, and that he filed a claim against the father's estate because she got his property, on the theory that she should pay the claim if it was not otherwise paid. No proof was offered or received to the effect that, in the lifetime of the father, defendant agreed to take care of him in consideration of a promise to be paid therefor by being made his beneficiary by will. On cross-examination, unresponsively, plaintiff stated twice that he had thought defendant should pay his claim because she got the father's property. The closing incidents of the evidence were a question as to whether plaintiff knew at the time he was asked by defendant to aid her in caring for the father, that she had acquired, or was about to receive, property from him as consideration for supporting him, an objection to the question, at first sustained, but, upon it being stated that the question was confined to what occurred at the time plaintiff was requested to take care of the father, the court saying the question could be answered if counsel purposed proving anything on the subject which was said at the time of the request. Thereupon the subject was dropped. At the close of plaintiff's evidence, on motion of counsel for defendant, a nonsuit was granted and judgment was rendered accordingly.

For the appellant the cause was submitted on the brief of *John F. Watermolen.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

MARSHALL, J. It seems clear, the features of the complaint respecting defendant having received her father's estate as consideration for supporting him, and that she did not do so, but plaintiff did by her request, as indicated in the cause of action stated, were a relation of mere evidentiary circumstances and, as such, not properly pleadable. So no error was committed in striking such relation from the pleading.

Doubtless the fact, if there were such, that respondent had received or been promised her father's property as consideration for supporting him before she requested plaintiff to do so,—would be entitled to considerable significance on the question of whether there was a mutual understanding at the time of such request, that she should compensate appellant, as he claims was the fact. So proof of the existence of such circumstance was competent. The difficulty with appellant's position, however, is that no evidence on the subject was offered. Mere unresponsive suggestions that appellant expected pay from respondent because she got the father's property, were properly stricken out because of their unresponsive character. Had the evidence remained in the case it would not have established or tended to establish the claim that respondent received the property pursuant to a promise, made prior to the alleged implied agreement to pay respondent for caring for the father.

It is considered that the question as to whether appellant knew when respondent requested him to care for the father, that she had received, or was about to receive, property from the latter as consideration for supporting him, and the offer to allow any evidence that appellant might offer as to what

was then said on the subject between the parties, opened the door for appellant to prove the circumstance relied on, if it existed and was in mutual contemplation, by anything said at the time the request was made by respondent of appellant, upon which the claim against the former was predicated.

As the case stood at the close of the evidence, there was no proof that respondent received her father's estate in consideration of her having promised to support him, and no suggestion that any proof could be produced, other than that respondent did receive the father's property, which, standing alone, had the evidence been produced, would not have raised a jury question as to whether there was, as claimed, a mutual understanding twelve years before. There were the mere circumstances, that appellant, who was morally, as well as respondent, bound to support the father if he needed assistance, which does not appear to be the fact, was requested by respondent to assume such care; that he did so and carried the burden twelve years without any suggestion in the meantime that he expected compensation from his sister; and that he claimed such compensation in the end out of the father's estate. Such circumstances come far short of sufficient to warrant holding that it appeared, with reasonable certainty, that there was a mutual understanding, as claimed, at the time appellant took the father under his care. Therefore, the motion for a nonsuit was properly granted.

By the Court.—Judgment affirmed.

BODENHEIMER, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

October 28—November 12, 1909.

Railroads: Killing of horse on track: Evidence: Instructions invading province of jury.

1. Upon the evidence in an action for the value of a horse killed on defendant's track it is *held* that the trial court properly refused to direct a verdict for defendant.
2. The evidence being conflicting as to whether the horse was killed at a highway crossing or north thereof on defendant's track beyond a cattle-guard alleged to have been defective, a charge to the jury laying stress upon the strength of the testimony of the engineer of the train, who testified for defendant, and upon the weakness of the plaintiff's evidence, stating in effect that the engineer was either telling the truth or wilfully lying, and intimating that he was telling the truth, is *held* prejudicially erroneous as being argumentative and invading the province of the jury.
3. Further instructions, as to the testimony of the engineer, that there was nothing improbable in his story and nothing to suggest why it would be more favorable to him to have the horse struck at one place than another, that there was nothing to impeach him unless certain tracks seen by a witness for plaintiff were actually tracks made by this horse, and that the jury must endeavor to reconcile other testimony with that of the engineer, are *held* erroneous and prejudicial because precluding the jury from considering, in weighing the engineer's testimony, his employment by the defendant, his appearance and demeanor, the probability of his story, and other proper tests.
4. A charge that the testimony of a witness was of a negative character and not entitled to the same weight as that of another witness was erroneous, both because the testimony of the first witness, though negative in form, was positive in fact, and because the jury might well be of the opinion that the witnesses were not equally credible.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This is an action brought to recover the value of a horse killed by one of defendant's trains through the alleged negli-

gence of the defendant in not maintaining a suitable cattle-guard on the northeasterly side of its right of way where a highway crossed the same. The questions involved were whether the horse was struck north of the cattle-guard or on the public highway, and whether any want of ordinary care on the part of the plaintiff contributed proximately to the loss of the horse. The jury found that there was no contributory negligence on the part of the plaintiff and that the horse was not struck north of the cattle-guard. The evidence was conflicting as to whether or not the horse was struck north of the cattle-guard, there being evidence that he was struck on the highway south of the cattle-guard and also evidence tending to show that he was struck about fifty feet north of the cattle-guard. One witness testified that he saw tracks where the horse had walked through a ditch from the pasture from which he escaped, and saw where the horse turned and crossed the cattle-guard, and also tracks from the cattle-guard north on the right of way about fifty or sixty feet, and saw no tracks beyond this; also found hair and a piece of bone between the place where he found the last tracks and where the horse lay; that the tracks appeared to be fresh horse tracks, and such distance apart as to indicate that the horse was walking from a point near the cattle-guard northerly. The engineer on the train testified that the engine struck the horse on the highway crossing south of the cattle-guard, and that at the time the train was moving at a speed of from fifty to sixty miles an hour; that there was a curve in the track as it approached the crossing, and that with the train going north he was on the inside of the curve as he approached the crossing, and that he would have to be at least 500 or 600 feet south of the crossing before he could see the west rail of the track at the highway, and that the horse approached from the west and came onto the crossing and turned north, and about the time it turned north it was struck; that he practically struck the horse when he saw it, being within 100 feet of the crossing when he first

saw the horse; that the curve south of the crossing was about 800 feet from the crossing, and that at sixty miles an hour the train would travel from the curve to the crossing in one or two seconds. Another witness, who was working on the track about 2,400 feet north of the crossing, testified that he saw the train as it approached, but saw no horse at the crossing nor north of it. Another witness, who was on a load of hay east of the track a little over a block from the highway crossing with nothing to obstruct the view, testified that she saw the train pass over the crossing and no horse was struck there, and that if there had been she would have seen it, and that her view north of the cattle-guard was obstructed by bushes along the right of way. The court overruled a motion by defendant for a directed verdict.

Plaintiff duly excepted to the following portion of the charge:

"Now there is but one witness who has testified who says he positively knows what the fact is, and that is Mr. Kittel. The circumstances were such as detailed by him as to show that he could not be mistaken. He testifies positively to a fact which he must have in his own knowledge, and he is either telling the truth or he is wilfully telling a falsehood. There is nothing improbable in his story. There is no chance for his being mistaken, and nothing to suggest any motive on his part for falsifying in reference to it—that is, there is nothing in the situation or his connection with the accident which would suggest any reason why it would be more favorable to him to have the horse struck one place or the other. Is he wilfully lying when he says he struck the horse on the highway? Now, as I said, there is no testimony from any witness who claims to know positively where the horse was struck, except Mr. Kittel. The plaintiff relies upon circumstances, and those circumstances are the alleged finding of tracks north of the cattle-guard which were the tracks made by this horse. Now, in considering the testimony in reference to those tracks, you have two things to consider, and the first is: Are the witnesses who testify telling the truth? They may be telling the truth, not intending to falsify as to anything,

but they may be mistaken. And the next question you have to consider—Are they mistaken? Is what they saw, assuming that they are telling the truth, shown to be tracks made by this horse, or are they mistaken in reference to what they saw, in their supposition—conclusion—that those tracks were made by this horse? Unless you are satisfied that they are honest, what they saw were tracks made by this horse, or a horse, while he was walking or running, then there is no conflict of testimony in this case at all. There is nothing to impeach or overcome the testimony of Mr. Kittel unless what they saw were actually tracks made by this horse. Drop that out of the case and there is no evidence in this case tending to show that the horse was not struck just as Mr. Kittel testifies that it was. Now, you will consider whether if that horse came onto the track as Mr. Kittel testified it did, whether it could not have done so without her seeing it, even if she had been looking right at the train all the time; and then her testimony is of a negative character, which is not entitled to the same weight as positive testimony. She simply says that she didn't see the horse. She saw the train, but she didn't see the horse. That may be perfectly consistent with the truth of Mr. Kittel's statement that the horse came on the track and was killed just as he said. And the testimony of the sectionman is of a negative character. He doesn't say that there wasn't any horse on the track. It is conceded by everybody there was a horse on the track somewheres, and that he might have seen it by looking. He didn't see it. The only argument that can be made from that is that if the horse had been on the track, walking north of the highway, he would have been much more apt to have seen it than he would have been had it come onto the track as Mr. Kittel testified it did."

Motions were made by plaintiff to amend the verdict and for a new trial, which were denied and due exception taken, and judgment was rendered in favor of the defendant, from which this appeal was taken.

For the appellant there was a brief by *Sheridan & Evans*, and oral argument by *P. Sheridan*.

For the respondent the cause was submitted on the brief of *William G. Wheeler*.

KERWIN, J. The appellant claims that the judgment should be reversed for error in the charge. We have set out in the statement of facts the portion of the charge excepted to and need not recite it here. The main contention of the respondent is that, regardless of any alleged errors in the charge, the judgment should be affirmed, because the court should have directed a verdict for the defendant at the close of the evidence; therefore the plaintiff was not prejudiced by any subsequent error. This, of course, involves the question whether the evidence was such as to warrant the court in directing a verdict for defendant. We cannot agree with counsel for respondent that a verdict should have been directed. There was ample evidence to support a verdict for plaintiff. We have referred to the evidence briefly in the statement of facts and need not repeat it here.

We therefore come to the question whether the case was fairly submitted to the jury without prejudicial error. The vital question for determination by the jury was whether the horse was killed north of the cattle-guard. Upon this question there was a sharp conflict in the evidence, and, in view of its character, it was of the utmost importance that the issue be fairly presented to the jury. We think the charge was well calculated to impress the jury with the idea that they should find that the horse was killed on the highway crossing and not north of the cattle-guard. The great stress placed by the court upon the strength of the evidence of defendant's witness Kittel and the weakness of the evidence of plaintiff's witnesses was strikingly set forth in the charge. The court told the jury in effect that Kittel either wilfully swore falsely or was telling the truth, and used other language intimating that he was telling the truth, and thus invaded the province of the jury, who were charged with the duty of passing upon the credibility of the evidence. This portion of the charge was prejudicial error on the ground that it was argumentative and invaded the province of the jury. *Dingman v. State,*

48 Wis. 485, 4 N. W. 668; *Conway v. Mitchell,* 97 Wis. 290, 72 N. W. 752; *Schutz v. State,* 125 Wis. 452, 104 N. W. 90. By the charge the jury were not permitted to find that Kittel was mistaken, but were forced to find that he either told the truth or wilfully swore falsely. We think the jury would have been justified in finding that he was mistaken, although he honestly believed he was telling the truth. In view of the situation as set out in the statement of facts, it seems clear that Kittel may have been mistaken as to whether the horse was north or south of the cattle-guard when struck, and whether the conflict of evidence in that regard might not have been accounted for on the ground of innocent mistake was a proper question for the jury. *Moore v. Kendall,* 2 Pin. 99; *Ely v. Tesch,* 17 Wis. 202; *Roberts v. State,* 84 Wis. 361, 54 N. W. 580; *Smith v. Lehigh Valley R. Co.* 170 N. Y. 394, 63 N. E. 338.

The court further, after instructing the jury that the witness Kittel was either telling the truth or wilfully falsifying, told them in effect that there was nothing improbable in his story, nothing that would suggest why it would be more favorable to him to have the horse struck at one place than at the other, and that there was nothing to impeach or overcome his testimony unless what plaintiff's witness saw were actually tracks made by this horse, and that they must endeavor to reconcile other testimony in the case with Mr. Kittel's. This instruction was clearly erroneous and prejudicial, because it excluded from the jury the right to consider Kittel's employment by the defendant as a circumstance to be considered in weighing his testimony, as well as the appearance of the witness, his demeanor, and the probability or improbability of his story, and from weighing his testimony in the light of well-recognized tests permissible for that purpose.

Other portions of the charge respecting the credibility of the evidence of the witness Miss Cormier and the rule respecting positive and negative testimony, referring to the testi-

mony of Miss Cormier and Mr. Kittel, were erroneous and calculated to prejudice the jury, because it was not correct under the circumstances of the case to tell the jury that Miss Cormier's testimony was not entitled to the same weight as that of Mr. Kittel because negative in form though positive in fact, since the jury might well be of the opinion, independent of the character of the evidence as to being positive or negative, that the witnesses were not equally credible, and whether they were or not was clearly for the jury. *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 575, 119 N. W. 342; *Van Salvellergh v. Green Bay T. Co.* 132 Wis. 166, 111 N. W. 1120; Jones, Ev. (2d ed.) § 898 (901); 17 Cyc. 801. We see no escape from the conclusion that the jury must have been prejudiced by the errors committed in the charge; therefore the judgment must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded for a new trial.

DAY, Respondent, vs. EGERTSEN and wife, Appellants.

October 28—November 12, 1909.

Vendor and purchaser of land: Boundaries: Area: False representations: Rescission.

1. **In an action by the vendor for specific performance of a land contract, findings as to the true location of a quarter-post as established by the original government survey, and that the true boundaries of the tract sold were pointed out by the vendor to the vendee, are *held* to be sustained by the evidence.**
2. **A mere representation by description in a land contract that the land is half of a certain designated quarter-section cannot in an action for deceit or for rescission be held to be a representation that it contains eighty acres.**
3. **Designation of a tract of land in conversation between the vendor and vendee as "the east eighty" of a certain quarter-section was not in this case intended or understood as a representation of quantity or area, but was merely a short way of referring to the government subdivision.**

Day v. Egertsen, 140 Wis. 629.

APPEAL from a judgment of the circuit court for Rusk county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

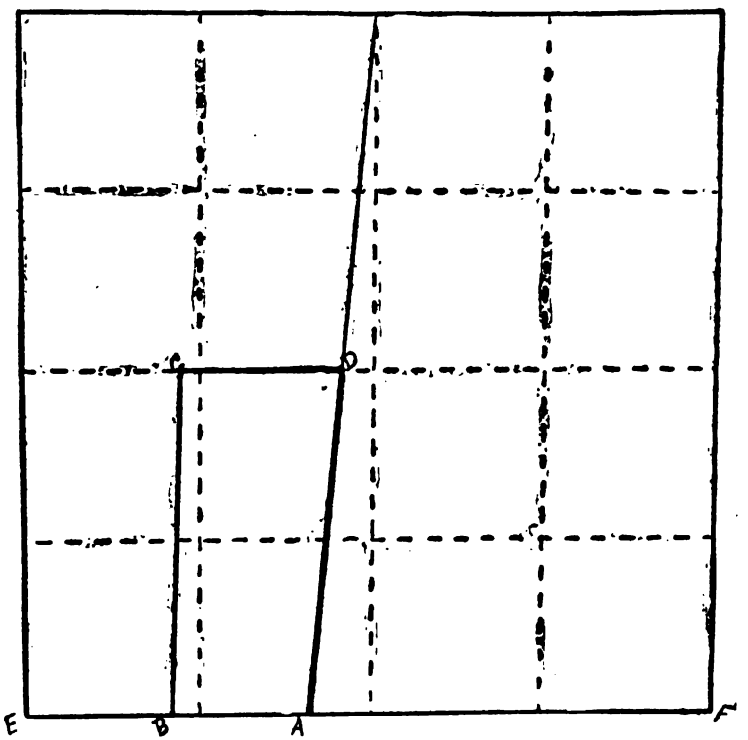
Charles Kirwan and *Arthur E. Coe,* for the appellants, cited, among other cases, *Zunker v. Kuehn,* 113 Wis. 421, 88 N. W. 605; *Bird v. Kleiner,* 41 Wis. 134; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Cotzhausen v. Simon,* 47 Wis. 103, 1 N. W. 473; *Castenholz v. Heller,* 82 Wis. 30, 51 N. W. 432; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 89 N. W. 532; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Gates v. Parmly,* 93 Wis. 294, 66 N. W. 253, 67 N. W. 739.

W. H. Stafford and *Glenn H. Williams,* for the respondent, cited, besides other authorities, *Bailey v. Costello,* 94 Wis. 87, 68 N. W. 663; *Ingersoll v. Seatoft,* 111 Wis. 461, 87 N. W. 460; *Rice v. Jerenson,* 54 Wis. 248, 11 N. W. 549; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Fleischfresser v. Schmidt,* 41 Wis. 223; *Neff v. Paddock,* 26 Wis. 546; *Gilman v. Brown,* 115 Wis. 1, 91 N. W. 227; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923; *Peterson v. Chase,* 115 Wis. 239, 91 N. W. 687; *Shawano v. Cayouette,* 134 Wis. 31, 114 N. W. 93; *My Laundry Co. v. Schmeling,* 129 Wis. 597, 109 N. W. 540.

TIMLIN, J. This is a suit for specific performance brought by the vendor in a land contract against the vendee and wife. The land was described in the contract as the east half of the southwest quarter of section 35, town 35, range 8 west, and not otherwise. This action was defended upon the ground, as stated in the answer and counterclaims, that the vendor falsely and fraudulently represented and pointed out certain fences as marking the east and the west boundary lines of the tract sold, when in truth such east and west boundary lines were each twenty-nine rods further east than the said fences

at the south end and about the same distance east of said fences at the north end of the tract in question. The land which lies between the true western boundary line of the land described in the land contract and the fence pointed out consists of about twenty-nine acres of good first-class cleared plow land, and the land which lies between the true eastern boundary line of the tract described in the land contract and the east fence is about twenty-nine acres of flat, swampy, and unim-

SECTION 35, TOWN 35, RANGE 8.



The above diagram is copied from that annexed to the findings of the trial court. The quarter-post was found to have been established at the point A. The eastern and western boundaries of the land in question are represented by the lines AD and BC.— REP

proved land. The first-mentioned twenty-nine acres is in the possession of William Topp, who claims by warranty deed under the plaintiff, and the second twenty-nine acres is held and claimed and inclosed by one John Tymon, who claims to be the owner thereof.

This defense, properly understood, avers no shortage in the quantity of land agreed to be conveyed. If the west fence was twenty-nine rods west of the true west boundary and the east fence twenty-nine rods west of the true east boundary, the tract inclosed by the fences would be exactly equal in area to the tract inclosed by the true boundaries, although not identical in location on the ground, and of course, if the true boundary on the west is twenty-nine rods east of the west fence and the true boundary on the east is twenty-nine rods east of the east fence, the tract inclosed by the true boundaries is exactly equal to the tract inclosed by the fences. No discrepancy in the north and south extension of the land is claimed. Notwithstanding this, it seems to have been taken for granted at the trial that there was some difference in area between what the defendant considered the true boundaries and the tract inclosed by the fences. The court found, among other things, "that plaintiff made no misrepresentations as to the quantity of land, that the boundary lines of said land were correctly represented to said defendant *Lavst S. J. Egertsen* by the plaintiff, and the east and west lines are substantially as indicated by the fences then on such sides, and the south quarter-post of said section was duly established where the original government survey located and established it upon the ground and as originally designated upon the ground by original landmarks of the survey and location of said quarter-post, and is at a point in the highway indicated by an iron peavy socket sunk in the ground near the center of the highway, southerly from the southeast corner of said fence, said fence and the southeast corner thereof being located near the northerly margin of said highway."

He annexed a diagram to his findings, representing the boundaries of the land in question by red lines lettered as

there indicated. This represents the land described in the land contract as subdivided agreeably to the south quarter-post of section 35, and it is conceded that the land thus described in the findings lacks about ten acres of the usual eighty-acre content.

From the foregoing it will be seen that the defendants were defeated because it was found that the true boundaries of the tract sold were pointed out or represented by the vendor; that is to say, conforming substantially to the fences then existing on the east and on the west sides. There is much evidence to support this finding of fact, and it is an inflexible rule of this court to refuse to disturb findings so made. It would serve no good purpose to discuss this evidence in detail. It is sufficient to say that witnesses were produced who professed to have seen and to know the location of the original government bearing trees for this south quarter-post, and from this they located the quarter-post as found by the court. The quarter-post as located by some former survey conforming in location to these bearing trees was also testified to. The location of this quarter-post determined the boundaries and content of the land in question. *Pickett v. Nelson,* 79 Wis. 9, 47 N. W. 936; *Lampe v. Kennedy,* 49 Wis. 601, 6 N. W. 311; *Vroman v. Dewey,* 23 Wis. 530. Of course it is possible that these witnesses might be mistaken or might be wrong, but the same weakness inheres in all oral testimony.

The defendant offered evidence tending to show that the quarter-post was placed, or was lost and should be re-established, at a different point, and if so established the representations of the plaintiff as to the boundaries of the tract in question would have been untrue. But the court found with the plaintiff, and that finding, supported by evidence, is conclusive upon us. The appellant contends further that it was represented by the plaintiff that the tract in question contained eighty acres of land, and that it is conceded and found that there were only about seventy acres in the tract. But no

such defense is pleaded. It is contrary to the pleading of defendant. A mere representation by description in a written instrument that the land is half of a certain designated quarter-section cannot in an action for deceit or for rescission be held to be a representation that it contains eighty acres of land. It is well known by those familiar with government surveys that the contrary is often true. Besides, the trial court found that, while this tract was designated in conversation between vendor and vendee as "the east eighty," this was not intended or understood as a representation of quantity or area, but as a mere short way of referring to the government subdivision. We find no reversible error.

By the Court.—Judgment affirmed.

STATE EX REL. WILLIAMS, Respondent, vs. SAWYER COUNTY and another, Appellants.

October 28—November 12, 1909.

Constitutional law: Legislative power: Delegation to municipalities: Statutes: Partial invalidity: Special municipal courts: Powers of county board: Adoption of general law: Separate resolution, when necessary: Mandatory statute: Rescission of resolutions.

1. In matters purely local and municipal, the legislature may enact a conditional law and refer it to the people or proper municipal authorities to decide whether such law shall or shall not have force and effect in their respective municipalities.
2. Such a law must be a complete enactment in itself; and the only thing that may be left to the people to determine is whether they will avail themselves of its provisions.
3. Where parts of a statute are valid and capable of being executed independently of other parts which are invalid, the valid parts may become operative unless the court can say that the legislature intended that all the provisions should be carried into effect as a whole and as conditions and compensations for each other.

4. Ch. 651, Laws of 1907, creates and establishes in each county "one or more courts, as may be provided for," to be known as special municipal courts, and provides (sec. 2523—2) that the county board of any county may adopt the act by resolution, and upon such adoption may, "in like manner and upon a like vote, provide for a special municipal court or courts," etc. *Held*, that the act is void under sec. 2, art. VII, Const., so far as it attempts to delegate to the county board power to decide upon the number of courts to be established in the county, but is valid to the extent of creating and establishing one municipal court in each county (at least in such counties as had no municipal court when the act was passed), and to such extent only does it become operative when adopted in the manner therein provided.
5. Certain administrative, and perhaps other, functions may properly be conferred by such a general law upon the county board to enable it to execute and carry into effect the law when adopted, as the providing of an office for the judge, determining his salary and the places where he shall hold court, and the like.
6. The requirement in sec. 2523—2, Stats. (Laws of 1907, ch. 651), that the law shall be adopted by resolution before any action shall be taken by the county board to provide for the court, is mandatory; and where a county board attempted in a single resolution to adopt the law and make provision for a court thereunder, the latter part of the resolution, at least, was void.
7. Whether, in such case, so much of the resolution as adopted the law was valid, not determined. If valid it cannot be rescinded by subsequent action of the county board, at least in the absence of express legislative authority so to do; but so much of the resolution as was void could properly be rescinded.

APPEAL from a judgment of the circuit court for Sawyer county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This was a *certiorari* proceeding brought to review the action of the county board of Sawyer county in rescinding a former resolution passed by it adopting the provisions of ch. 651, Laws of 1907. By a single resolution adopted by the county board at a meeting held on March 4th the provisions of ch. 651, Laws of 1907, were adopted and a special municipal court for said county was created. The resolution fixed the place at which the judge of such court should hold his office, and provided for court accommodations, an official seal, necessary records and stationery, and for blanks, furni-

ture, fuel, and lighting. By such resolution the county clerk was instructed to give the requisite notice that such judge would be elected on the first Tuesday in April, 1908. The salary of such officer was fixed at $900 per year. After the passage of such resolution the relator became a candidate for the office of municipal judge, and secured the necessary number of signers to have his name placed on the official ballot, and it was so placed, and he was elected on the first Tuesday in April, 1908. In the meantime, and on April 2d, a special meeting of the county board of Sawyer county was called, at which meeting a resolution was passed rescinding the resolution adopted on March 4th. The validity of the resolution last passed is attacked in this proceeding. By its judgment the court annulled such resolution and declared it to be void and of no effect. From such judgment this appeal is taken.

F. L. McNamara, for the appellants.

Horace B. Walmsley, for the respondent.

BARNES, J. "In matters purely local and municipal, the legislature may enact conditional laws, and refer it to the people or proper municipal authorities to decide whether such laws shall or shall not have force and effect in their respective municipalities." *Slinger v. Henneman,* 38 Wis. 510. Such a law must be a complete enactment in itself. It must contain an entire and perfect declaration of the legislative will, and it must require nothing to perfect it as a law. The only thing that may be left to the people to determine is whether they will avail themselves of its provisions. *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149, 153; *Dowling v. Lancashire Ins. Co.* 92 Wis. 63, 69, 65 N. W. 738; *In re North Milwaukee,* 93 Wis. 616, 620, 67 N. W. 1033; *Adams v. Beloit,* 105 Wis. 363, 369, 81 N. W. 869.

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends

to make, its own action to depend." *Dowling v. Lancashire Ins. Co., supra,* at p. 69; *Adams v. Beloit, supra,* at p. 369; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905.

Tested by these principles, can ch. 651, Laws of 1907, be sustained as a valid enactment in its entirety? While the case under consideration might be disposed of without pointing out the infirmities of the law, it was thought best to do so in order to prevent illegal courts from being established thereunder and to avoid the confusion that might arise from the trial of causes and the rendition of judgments by unconstitutional courts. Sec. 2523—1 of the law in question provides:

"There is hereby created and established in each county of this state one or more courts, as may be provided for, to be known and designated as special municipal courts and with the powers and jurisdiction as hereafter provided."

Sec. 2523—2 provides that the board of supervisors of any county may, by a majority vote of all its members elect, adopt the act by resolution, and upon such adoption may, "in like manner and upon a like vote, provide for a special municipal court or courts as herein provided, to be known and designated as the First (or other numerical designation) Special Municipal Court of —— County."

Can the legislature vest in a county board the power to say when and how many municipal courts may be established in a given county? Does not the power attempted to be given confer upon the county board something more than the mere right to adopt the provisions of the law? Does it not in fact confer upon such board the power to legislate new courts into existence? If the law in its entirety can be upheld, it is the duty of the court to uphold it. If the entire act cannot be sustained, it is the duty of the court to sustain the valid portion of it, if it can do so without violating established principles of law. It is well settled that an act may be unconstitutional in some of its provisions and valid in others. Where parts

of a statute are valid and capable of being executed independently of other parts which are invalid, the valid parts may become operative unless the court can say that the legislature intended that they should all be carried into effect as a whole and as conditions and compensations for each other. *Lynch v. Steamer Economy,* 27 Wis. 69; *State ex rel. Walsh v. Dousman,* 28 Wis. 541; *Slauson v. Racine,* 13 Wis. 398, 404.

Sec. 22, art. IV, Const., empowers the legislature to confer on the boards of supervisors of the several counties of the state such powers of a local, legislative, or administrative character as they shall from time to time prescribe. But by sec. 2, art. VII, Const., the power to create and establish such courts as are provided for by ch. 651, Laws of 1907, is exclusively vested in the legislature and must be exercised by it. We do not doubt that a valid option law may be passed providing for the creation of municipal courts. But such a law must be complete and perfect in itself, and must become operative upon a vote which simply adopts its terms. Discretion to say what the law shall be after it is adopted, or to what extent it shall be applicable, may not be conferred on the people of a county or on its board of supervisors. It is here left to the discretion of the county board to say whether there shall be two or more courts in a given county. This is a legislative function which we hold cannot be delegated. The board is given not only the option to adopt the law, but the further option to decide upon the number of courts that may be established under it. This cannot be done. *People ex rel. Bolt v. Riordan,* 73 Mich. 508, 41 N. W. 482; *Pueblo Co. Comm'rs v. Smith,* 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465; *State v. Nine Justices,* 90 Tenn. 722, 18 S. W. 393.

As we view the law, it does create and establish one municipal court in each county of the state, or at least in such counties as had no municipal court when the act was passed. When a county board votes to adopt its provisions, the law creating the single court becomes effective. Certain adminis-

trative and perhaps other functions are properly conferred on the county board to enable it to execute and carry the law into effect, such as providing an office for the judge and determining his salary and the places where he shall hold court, and the like. These functions could be conferred on the county board of Sawyer county in a special act creating a municipal court for that county, and we have no doubt can be conferred under a general law. *Ryan v. Outagamie Co.* 80 Wis. 336, 50 N. W. 340; *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Bartlett v. Eau Claire Co.* 112 Wis. 237, 88 N. W. 61. But functions such as these are wide apart from authority to create or legislate a court into existence in the first instance.

No substantial reason occurs to us why the valid portion of this law should not be upheld. The legislature had the laudable purpose in mind of passing one general act applicable to the entire state in lieu of enacting a multitude of special acts limited in their application to a single county. The valid portion of the law will no doubt fulfil the requirements of most of the counties of the state, and it is not apparent how the void portion was any condition or compensation for the passage of the valid part. We conclude, therefore, that the act is valid to the extent of creating and establishing one municipal court in each county of the state, and that to such extent only does it become operative when adopted in the manner therein provided.

The county board by a single resolution adopted the provisions of ch. 651, Laws of 1907, provided for the establishment of a single municipal court, fixed the salary of the municipal judge, designated the places where court should be held, provided for office accommodations, provided that notice of election should be given, and provided for various other matters pertaining to such court. Manifestly the plain mandate of the statute was violated by the adoption of such a resolution. The law required that the board should first

adopt its provisions by resolution, and that thereafter another resolution, separate and distinct from the first, might be adopted providing for one or more courts as the board might determine, and also that the board should determine the place or places where court should be held, and make other necessary provisions to put the law in working operation. Until the law was adopted there was no court to provide for. The legislature had the undoubted right to provide that the law should be adopted before any proceeding should be taken under it, and it has so provided. And it is the opinion of the court that such provision is not merely directory, but is mandatory, and that any action taken towards establishing the court before the resolution was passed accepting and adopting the provisions of the law was premature and without jurisdiction and therefore void. It is true that no particular interim need elapse between the passage of the resolution adopting the law and the subsequent resolution designed to carry the law into effect, and that the presumption is very strong that, if two resolutions had been offered instead of one, both would have been passed. It was entirely reasonable, however, for the legislature to provide that the matter of adopting the law should be voted upon as a separate and distinct proposition. It was also a proper and orderly requirement that the resolution passed for the purpose of carrying the law into effect should be voted upon as a separate and distinct proposition, and not be voted upon until there was some law in force which warranted the passage of such resolution. The cases generally hold that propositions submitted to electors must be submitted singly so as to give the elector an opportunity to record his vote on each separate and distinct proposition submitted. *McBryde v. Montesano,* 7 Wash. 69, 34 Pac. 559; *Truelsen v. Duluth,* 61 Minn. 48, 63 N. W. 714; *Fulton Co. v. M. & W. R. Co.* 21 Ill. 338; *People ex rel. Peoria & O. R. Co. v. Tazewell Co.* 22 Ill. 147, 156.

While the present case is not entirely analogous to those cited, in that a member of the county board would have the right to demand that the resolution offered be divided, and no such demand appears to have been made here, still the principle is a wholesome one even as applied to bodies like county boards. We do not think the board could ignore the plain provisions of the statute in this regard, and, it having done so, we conclude that so much of the resolution as provided for the creation of the court was void.

If the law had been properly adopted and the proper resolution had been passed creating the court, it would be beyond the power of a county board by subsequent resolution to rescind its action, at least in the absence of express legislative authority so to do. To hold otherwise would be equivalent to saying that it might repeal a law of the legislature of the state which had become operative in the particular county. *Northern T. Co. v. Snyder,* 113 Wis. 516, 533, 89 N. W. 460.

It is argued that the only proceeding attacked is the resolution of the county board of April 2d rescinding its former action, and that if the law was adopted in a legal way then it was beyond the power of the board to undo what had been done, and, if not, no injury resulted from reversing the action of the county board in passing a resolution which served no useful purpose. We think it was proper for the board to expunge from its records, in so far as it could, the former resolution passed by it, which was at least void in part. We do not hold that so much of the resolution of March 2d as adopted the provisions of the act in question may not be valid; and, if valid, it could not be repealed by the action subsequently taken. It was proper, however, to rescind so much of the resolution as we hold to be void for the reasons herein stated.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the proceedings.

CITY OF ASHLAND, Appellant, vs. MACIEJEWSKI, Respondent.

October 28—November 12, 1909.

Statutes: Construction: Changing words.

1. Where the words of a statute are plain in meaning and lead to no absurd result there is neither room for construction nor justification for the elimination or change of words.
2. Thus, in a city charter providing that "no city officer shall be accepted as surety upon any bond, contract or other obligation made *by* the city," the courts cannot substitute the word "to" in place of the word "by," the provision as enacted not being absurd.

[3. Whether the words "bond, contract or other obligation" could be construed as applying to a recognizance given on appeal from a municipal court, not determined.]

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *W. S. Cate,* attorney, and *F. J. Colignon,* of counsel, and for the respondent on that of *A. P. Haagenson,* attorney, and *Sanborn, Lamoreux & Pray,* of counsel.

WINSLOW, C. J. The respondent was convicted of the violation of a municipal ordinance in the municipal court for Ashland county and appealed to the circuit court, the recognizance upon the appeal being signed by one Erickson (a city officer) as surety. The judgment of conviction was, after trial, reversed in the circuit court, and the city appeals to this court. The only contention made by the city is that the recognizance was void, and hence that the circuit court acquired no jurisdiction of the case.

Sec. 5 of subch. XXI of appellant's charter (ch. 27, Laws of 1889) contains this provision: "No city officer shall be accepted as surety on any bond, contract or other obligation made by the city." It is contended that the insertion of the

word "by" in this sentence is a palpable error, and that the court should in effect insert the word "to" in its place, and apply the provision as so amended to the recognizance. This we cannot do. When the words of a legislative act are plain in meaning and lead to no absurd result, there is neither room for construction nor justification for the elimination or change of words. Courts cannot legislate. Their business is only to enforce a plain statute as it reads, providing it be not unconstitutional or absurd upon its face. *Gilbert v. Dutruit,* 91 Wis. 661, 65 N. W. 511; *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839. The provision that a city officer shall not become a surety on any bond, contract, or obligation given by the city is not absurd, even though its necessity or wisdom may be open to doubt.

It may be a grave question whether the words "bond, contract or other obligation" can properly be construed to apply to a recognizance such as the present, but our conclusion on the first proposition renders it unnecessary to consider this question.

By the Court.—Judgment affirmed.

MATZEWITZ, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

October 28—November 12, 1909.

Railroads: Liability to laborers for contractors: Notice of claim, upon whom served: Assignment of claim: Real party in interest.

1. Sec. 1815, Stats. (1898),—providing that a laborer to whom a contractor for the construction of a railroad shall be indebted for labor performed in such construction may make the railroad company directly liable by serving notice of his claim upon "an engineer, agent or superintendent" in the employment of the company, "having charge of that part *of the road* on which such

labor was performed,"—does not require the notice to be served upon the particular employee in charge of the *construction work* on that part of the road; the intention being that service should be made upon an employee who would be likely promptly to bring home to the company knowledge of the existence of the claim, rather than upon one who would know whether the claim was legitimate or not.

2. Delivery by the laborer of his time check to another person for collection, writing his name on the back thereof as evidence of the authority, and borrowing a small sum from such person on the claim, did not constitute such a transfer of title as took the claim out of the protection of the statute.

3. The creation of such a mere agency, though coupled with an interest, to collect the claim for the benefit of the laborer, did not make the agent the real party in interest who must be plaintiff in an action to enforce the claim.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Action to enforce a laborer's claim under sec. 1815, Stats. (1898).

The issues raised by the pleadings were closed by these conclusions: In 1907 the defendant was engaged in railroad construction in Douglas county, Wisconsin, under a principal contractor, one Balch, and his subcontractor, Philbrook. The duties of the latter were, in part, to look after the camps, hire and discharge men, keep their accounts, board them, direct them as to their work, and give statements of the amounts due for their work in excess of offsets. Prior to August 8, 1907, Balch employed plaintiff to work constructing the road at $2 per day, pursuant to which the latter did nineteen and one-half days' grading work between stations 562 and 604. The work commenced August 8 and lasted, continuously, till August 29, 1907. The amount due and unpaid therefor is $25.73. At the termination of the work, plaintiff was given by Philbrook, in his representative capacity, a statement of his time, specifying the wages per day, part of the road on which his labor was performed, balance due over all offsets, and the time when such balance was payable, the due date being

September 29, 1907. August 30, 1907, plaintiff employed one Sever to collect his claim. To facilitate the collection, and for no other purpose, plaintiff wrote his name upon the back of his statement, and delivered it to Sever, the latter loaning thereon $5.73, under an agreement for repayment out of the proceeds of the collection. Within thirty days after the due date of the claim, plaintiff, by his attorney, served defendant with a notice in writing, signed by such attorney, stating the facts aforesaid and claiming the benefit of sec. 1815, Stats. (1898). The notice was served on one Gillis, who was then, and when the work was done, the agent, engineer, and superintendent of the road in charge of that part upon which the work was done. He was a proper person upon whom to make the service and he, promptly, sent the notice to his principal at its headquarters. The service was within the thirty days after the due date of the claim, and suit was commenced within sixty days after the service.

On such facts, judgment was ordered in plaintiff's favor and was rendered accordingly.

For the appellant there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.* They contended, *inter alia,* that the assignment by plaintiff of his claim destroyed his right to a lien. *Hickok v. Laubssier,* 1 Morris (Iowa) 115; *Weirick v. Mahoning Co. Bank,* 16 Ohio St. 297; *Seymour v. Van Slyck,* 8 Wend. 403, 422; *Ford v. Mitchell,* 15 Wis. 304, 308; 4 Cyc. 44; *Chapman v. Plummer,* 36 Wis. 262, 265; *Wooliscroft v. Norton,* 15 Wis. 198; *Tewksbury v. Bronson,* 48 Wis. 581; *Shearer v. Browne,* 102 Wis. 585, 587; *Fraker v. Reeve,* 36 Wis. 85; *Cummings v. Morris,* 25 N. Y. 625; *Chase v. Dodge,* 11 Wis. 70, 72. The assignment must be construed to be at least an assignment to secure Sever for his payment of $5.73, and that he was to collect and receive the whole claim. The holder of a chose in action as collateral security is the real party in interest and must bring the action, and the assignor for security may not.

Hilton v. Waring, 7 Wis. 492; *Curtis v. Mohr,* 18 Wis. 615; *Morgan v. South Milwaukee L. V. Co.* 97 Wis. 275, 277. And this rule applies as well to nonnegotiable instruments as to negotiable. *Archibald v. Mut. L. Ins. Co.* 38 Wis. 542.

For the respondent the cause was submitted on the brief of *D. E. Roberts* and *Michael S. Bright,* attorneys, and *Walter S. Whiton,* of counsel.

MARSHALL, J. Was the person upon whom the notice was served the defendant's engineer, agent, or superintendent, in its employment, having charge of that part of the road on which the labor was performed? It is contended for appellant, that the finding in the affirmative is contrary to the clear preponderance of the evidence, because the statute contemplates that the person upon whom service is required to be made shall be the particular employee, in such charge of the work as to be likely to know the facts in regard to the claim.

We can see no good reason for restricting the plain meaning of the statute by construction. It means, doubtless, just what the ordinary sense of the words signifies. The person upon whom the service must be made, in any such case, is the one who, as engineer, agent, or superintendent for the railroad company, has charge of that *part of the road* on which the labor was performed. It is the one who has such general charge, whatever may be his designation.

Had the legislature intended the service to be made upon the employee in the immediate charge of the construction work, it would have said, in charge of the work instead of *"of the road."* The purpose, doubtless, was to require the service to be made upon an employee of such grade as to be likely to promptly bring home to the corporation knowledge of the existence of the claim, rather than upon one sufficiently in touch with the particular work as to know whether the claim was legitimate or not. Such purpose was not, merely, to enable the particular person, primarily receiving the notice, to report

the facts, but to reach the corporation and give it reasonable opportunity to protect itself against a double liability which would result by paying the contractor and then having to pay over again to the laborer.

That the person upon whom the notice was served in this case had general authority over that part of the road contemplated by the statute, requisite to competency to receive the service, is amply shown by the evidence.

The claim that the statute should be construed as requiring a notice to be served on the person in the immediate charge "of the construction" of that part of the road in regard to which the labor was performed, when it relates to such construction work, is effectually negatived by the fact that, whereas, formerly, for a long period of time, service, in such cases, was required to be made on the person "in charge of the construction work," the statute was changed to its present form so as to require it to be made on the person "in charge of that part of the road" on which the labor was performed, thus pointing to a person higher up in grade than the one in the immediate charge of construction work.

It is considered that the circumstances, amply shown by the evidence, that the plaintiff merely delivered his claim to a person for collection, writing his name on the back thereof as evidence of the authority, and borrowing a small sum on such claim, warranted the conclusion that there was no parting with the title so as to take the claim out of the protection of the statute, under the doctrine of *Fraker v. Reeve,* 36 Wis. 85, and similar authorities, to the effect that the special statutory provisions for the protection of creditors in particular cases, such as this, do not follow the creditor right into the hands of a purchaser. That does not apply where there is no parting with title to the right by the original creditor, but only the creation of a mere agency, coupled with an interest, to enforce such right, in general, for the benefit of the creditor, as held in *Bernhardt v. Rice,* 98 Wis. 578, 74 N. W.

370. The logic of that case is that a transfer of a claim which does not pass the beneficial interest is not a sale and so is not an attempt to transfer a lien or a claim with a lien incident.

True, a statutory lien incident to a contractual claim, unless made so by the statute, is not transitory in the sense of being assignable, but, so long as there is no transition of the beneficial interest, there is no severance from the claim, or loss, of the lien incident.

Counsel refer to the rule that he who takes the title to a chose in action as security holds the legal title and, ordinarily, in judicial proceedings to enforce it, is the person who must be the plaintiff as the real party in interest; but we must distinguish between a transfer of title carrying the beneficial interest, primarily, though secondarily operating to discharge a debt of the vendor, as in *Fraker v. Reeve, supra,* and the mere creation of an agency to collect and apply or account for the proceeds, as in *Bernhardt v. Rice, supra,* and this case.

By the Court.—Judgment affirmed.

BOUCHIER, Respondent, vs. HAMMER, Appellant.

October 28—November 12, 1909.

Tax titles: Notices of tax sale: Posting and publication: Affidavits: Sufficiency: "Public place:" Nonoccupancy: Rights under successive tax deeds: Appeal: Briefs.

1. If the affidavit of the posting of notices of a tax sale declares conduct of the treasurer in the posting which complies with the statute, the validity of that step in the proceedings is established *prima facie.* A statement therein that the notices were posted in four public places, accompanied by a specification of places not inherently non-public, is such evidence as, undisputed, establishes the fact required by sec. 1130, Stats. (1898).

2. The term "public place" in sec. 1130, Stats. (1898), means a place where the public resort, so that the posting of a statement there is likely to give notice.
3. An affidavit stating that the place in the county treasurer's office at which one of the notices was posted was a conspicuous place, satisfies the statute, and it is not necessary to define with particularity the exact spot in that office upon which such notice was posted.
4. A printer's affidavit stating that the notice of a tax sale which took place on May 17 was printed and published in a certain newspaper "once in each week for four successive weeks, commencing on the 15th of April and terminating on the 6th of May," shows a publication once in each week for four successive weeks prior to the date of sale, as required by sec. 1130, Stats. (1898), although the printing terminated in twenty-two days.
5. An affidavit of nonoccupancy, made five days before the tax deed was issued, which declared both that at the time it was made, May 16, there had not been thirty days of continuous actual occupancy, and that on that day there was no occupancy, establishes the fact that there could not have been the thirty consecutive days' occupancy within the meaning of sec. 1175, Stats. (1898), on May 21, the date of the deed.
6. Upon appeal infirmities claimed to exist in affidavits made in tax proceedings should be pointed out by counsel. The court cannot assume the duty of searching for them.
7. The holder of a tax certificate issued in 1902 who purchased the land at the tax sales in 1903 and 1904 did not thereby pay the taxes so as to prevent him from claiming title under either of the tax deeds based on such sales.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Plaintiff, concededly the original owner of certain lands in Price county, brought ejectment against the defendant, who set up title by three successive tax deeds based upon tax sales in the years 1902, 1903, and 1904. The sole question was the validity of those tax deeds. The evidence consisted entirely of the record of the various tax sale and deed proceedings. Court found all three deeds invalid by reason of certain defects alleged to exist in the proceedings, and rendered judgment for plaintiff, from which defendant appeals.

The cause was submitted for the appellant on the brief of

W. K. Parkinson, and for the respondent on that of *Barry & Barry,* attorneys, and *K. K. Kennan,* of counsel.

DODGE, J. As the defendant pleads title under each of three distinct tax deeds, any one of them, if valid and based upon legal and regular procedure, is sufficient to establish his title and, therefore, his defense. Sec. 1176, Stats. (1898). For this reason we shall consider only the infirmities in the deeds based upon tax sales of 1903 and 1904 and in the conduct of those sales.

1. The first ground of invalidity, and that common to both sales, is the alleged insufficiency of the affidavits by the county treasurer to posting of notices of the tax sale in compliance with sec. 1130, Stats. (1898), which requires that the treasurer shall cause copies of notice, etc., to be "posted in at least four public places in such county, one of which copies shall be posted up in some conspicuous place in his office;" also that he shall file affidavit of such posting. The affidavit in this case declares that he

"posted up the copies of the annexed statement and notice in five public places in said Price county, Wisconsin, to wit: on April 18, 1904, one of which copies was posted in a conspicuous place in the office of said county treasurer in the courthouse in the city of Phillips in said county; one copy in the office of the county clerk in the courthouse in the city of Phillips in said county; one copy on the front of the building known as the Turner House in the village of Park Falls, in said county; one copy on the front of the building known as the Jump River House in the village of Prentice, in said county; one copy on the inner wall in the postoffice in the town of Ogema in said county."

While it is intimated, if not in terms declared, in *Jarvis v. Silliman,* 21 Wis. 599, and *Hart v. Smith,* 44 Wis. 213, 226, that an affidavit stating that such notices were "posted in four public places in the county" satisfies this statute, an affidavit directly to that effect was apparently held invalid,

although without any debate and on concession of counsel, in *Wis. Cent. R. Co. v. Wis. River L. Co.* 71 Wis. 94, 36 N. W. 837, although that decision is rendered indefinite and uncertain upon the particular point because of other defects found in the affidavit. It is further decided in *Hart v. Smith* that a mere description of the places without declaring them to be public may be sufficient if the court can see from the description that they are of the character indicated by the words "public places." The suggestion is made by the court that the better method to satisfy the statute is to describe the places and make affidavit to the fact that they are public. In *Hilgers v. Quinney,* 51 Wis. 62, 8 N. W. 17, the places were described, but were such as not necessarily to be public. The affidavit was condemned on the sole ground that the only allegation was that they were "public places in the city of Chilton," which, said the court, would not necessarily make them public places in and for the county; the intimation being clear that had they been declared to be public places of the county that would have sufficed. In *Allen v. Allen,* 114 Wis. 615, 91 N. W. 218, the several places were described as at certain specified postoffices without declaring them to be public places, and it was held sufficient. In *Myrick v. Kahle,* 120 Wis. 57, 97 N. W. 506, the latest case on the subject, the affidavit was condemned because it described places which might or might not be public and failed to declare that they were public places, with the clear intimation that if such fact had been declared *in hæc verba* the statute would have been satisfied. We think it obvious that the result of these decisions, in light of the words of the statute, is to the effect that if the affidavit on file declares conduct of the treasurer in the posting which complies with the statute, the validity of that step in the proceedings is established *prima facie.* It is declared in several of the cases cited that the allegation that a place of posting is a public place involves both a statement of fact and a conclusion of law. But the expression "public

place" is not occult. It is a part of the English language, and the words are common and ordinary in usage, and that, too, in their legal designation, namely, "a place where the public resort, so that the exposure of such a document is likely to give notice. The publicity of the place involves in common statement quite as much, if not more, of the element of fact as it does of legal conclusion. There is no good reason why the assertion that the posting in four public places, accompanied by a specification of places not inherently non-public, is not such evidence as, undisputed, establishes the fact required by sec. 1130. If false, the specification of the place supplies the opportunity to prove the falsity; while the absence of such specification is a good practical reason for repudiating an affidavit which merely asserts them to be public, because then a sale might be conducted in fraud of the statute and no opportunity exist years afterwards to prove the fact. We conclude that the posting, as established by the treasurer's affidavit, duly filed, complies with sec. 1130.

Another criticism of this affidavit is that it merely declares that the place in the county treasurer's office, at which one of the copies was posted, was a conspicuous place. What we have said with reference to the phrase "public place," and the extent to which this upon its face must be considered a statement of fact, applies quite as strongly here. We think it was not necessary to go further and define with particularity the exact spot in that office, whether upon the walls, windows, doors, or furniture, such notice was posted.

2. Another defect asserted is that the printer's affidavit of publication showed that the notices were published only three weeks instead of four. The sale of 1903 took place on May 19th, that of 1904 on May 17th. The affidavit in each case declared that the notice "was printed and published in such newspaper once in each week for four successive weeks, commencing on the 15th of April and terminating on the 6th of May." Of course there is confusion of terms between the

affidavit and the statute. The latter requires that the notice shall be published once in each week for four successive weeks prior to the day of the sale. This of course requires a period of twenty-eight days of publication before the sale, but that publication is accomplished by issue of the paper containing the notice on four distinct days, one only in each week; so "publication of notice" may apply to the term of notice, but it may also apply to the physical fact of printing the notice in a published newspaper, and clearly that is the significance in which it is used in this affidavit, and indeed is the meaning given to the expression by this court in *Chippewa River L. Co. v. J. L. Gates L. Co.* 118 Wis. 345, 357, 94 N. W. 37, 95 N. W. 954. The joining with the word "published" the word "printed" in this affidavit emphasizes and renders sure the meaning in the mind of the affiant. So read, it establishes four printings, and the dates are entirely consistent with that assertion; May 6th being the day upon which a weekly paper would be issued which also was issued on the 15th of April. We think there is no ambiguity in this affidavit, but that it declares that on four specific days in separate successive weeks this notice was printed, and that more than one complete week after its last printing elapsed before the day of sale, and that constitutes in law a publication for four weeks, although the printing terminated in twenty-two days.

3. The deed upon the sale of 1903 is further assailed on the ground that the so-called affidavit of nonoccupancy was sworn to five days before the deed issued. The affidavit declared both that at the time it was made, May 16th, there had not been thirty days of continuous actual occupancy, and that on that day there was no occupancy. Such an affidavit necessarily establishes the fact that there could not have been the thirty consecutive days' occupancy within the meaning of the statute on May 21st, the date of the deed. This court has at least twice so ruled. *Dreutzer v. Smith,* 56 Wis. 292, 302,

14 N. W. 465; *Howe v. Genin,* 57 Wis. 268, 269, 15 N. W. 161.

4. It is asserted that the printer's affidavit as to the sale of 1904, in distinction from that of 1903, failed to state that the newspaper was a legal newspaper under the description of sec. 1130. We are unable to understand what respondent's claim is. The affidavit of 1904 contains the same declaration that the paper had been published in Price county for the legal period as does the affidavit of 1903, differing only in that it asserts its publication for a period of more than three years instead of two. There is no material distinction between the two affidavits in this respect. If there is any infirmity in that of 1904 it should have been pointed out. We cannot assume the duty of searching for it.

5. It is further contended by respondent that appellant cannot claim under either of the later deeds; that his purchase at the sales in 1903 and 1904 after his purchase of the tax certificate in May, 1902, must be deemed a payment of those taxes. This contention, however, is negatived by *Lybrand v. Haney,* 31 Wis. 230, and *Patterson v. Cappon,* 129 Wis. 439, 109 N. W. 103.

In conclusion: we find none of the alleged defects in either of the deeds on the sales of 1903 or 1904 to exist, and must therefore recognize those deeds as having all the effect conferred by sec. 1176, Stats. (1898), to vest in the grantee, the appellant, an absolute estate in fee simple in said land, at least as against the plaintiff.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for defendant.

BARNES, J., dissents.

MATHEWS and others, Respondents, vs. PUFALL and wife, Appellants.

October 28—November 12, 1909.

Pleading: Striking out frivolous answer.

In a foreclosure action the complaint alleged that a note and mortgage were executed by defendants to plaintiffs and that plaintiffs are now the lawful owners and holders thereof. The answer admitted such execution but alleged that defendants "have not sufficient information or knowledge to enable them to form a belief as to whether or not plaintiffs are the lawful owners and holders of the note and mortgage, and therefore deny the same." No fact was stated in the pleadings tending to show that there had been any transfer or change in the ownership of the note and mortgage. *Held*, that the answer was properly stricken out as evasive and frivolous.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This is an action to foreclose a real-estate mortgage executed by the defendants to secure the payment of a promissory note also executed by the defendants to the plaintiffs. Upon plaintiffs' motion to strike out the answer denying sufficient information to form a belief as to plaintiffs' ownership of the note and mortgage as evasive and frivolous, the court ordered it to be stricken out, and in default of an answer ordered judgment on the complaint. This is an appeal from such judgment.

For the appellants there was a brief by *Sanborn, Lamoreux & Pray,* and oral argument by *A. T. Pray.*

For the respondents the cause was submitted on the brief of *Lamoreux, Shea & Cate.*

SIEBECKER, J. The complaint is in the usual form in foreclosure actions, stating the amount now due and payable, and alleging the fact that the plaintiffs "are now the lawful

owners and holders of the said note and mortgage." The answer admits the execution of the note and mortgage, that no part of the note has been paid, and alleges that the defendants "have not sufficient information or knowledge to enable them to form a belief as to whether or not plaintiffs are the lawful owners and holders of the note and mortgage, and therefore deny the same." Plaintiffs' motion to strike out the answer as frivolous and for judgment was granted. A stay was ordered, but before the expiration of the stay the defendants excepted to the order granting the motion. Thereupon the court entered an order striking out the answer as frivolous and ordering judgment in favor of the plaintiffs.

The facts alleged show that the defendants were informed of all the facts as to plaintiffs' ownership of the note and mortgage at the time of their execution and delivery by defendants to the plaintiffs. The pleadings in the case allege no fact tending to show that there has been any transfer or change of ownership of the note and mortgage. The allegations that the plaintiffs were the original owners and are now the owners and holders of the note and mortgage presumptively show that no change in the ownership of the note and mortgage has taken place since their delivery to the plaintiffs, and their ownership thereof must be assumed to continue. A denial of plaintiff's ownership on insufficient knowledge or information to form a belief cannot be resorted to when the facts alleged in the complaint must of necessity be within the defendants' personal knowledge. If the defendants had alleged, in connection with such a denial, facts tending to show that the defendants were unable to obtain knowledge or information sufficient to form a belief as to whether or not the note and mortgage had been transferred by the plaintiffs before action was commenced, then this form of denial could have been employed by them. But no such facts are alleged by them, and hence they must be held to have personal knowledge of the fact of the ownership of the note and mortgage

which they attempt to deny. Under this state of the pleadings the court properly struck out this portion of the answer as evasive and frivolous. Sec. 2681, Stats. (1898); *Hathaway v. Baldwin,* 17 Wis. 616; *Milwaukee v. O'Sullivan,* 25 Wis. 666.

By the Court.—The judgment appealed from is affirmed.

NELSON, Respondent, vs. A. H. STANGE COMPANY, Appellant.

October 29—November 12, 1909.

New trial: Grounds, how shown: Appeal: Res judicata: *Reinstating verdict: One judge setting aside order by another: Bill of exceptions: Settling after time for appeal has expired: Special verdict: Sufficiency: Witnesses: Cross-examination: Master and servant: Injuries: Excessive damages.*

1. Although a written opinion of the trial judge indicates his reasons for granting a motion to set aside a verdict, yet the subsequent order setting it aside upon grounds expressly stated therein is the authentic and official evidence as to such grounds.
2. Where defendant appealed from an order granting to plaintiff a second new trial, but not from the order granting the first, affirmance of the order appealed from conclusively adjudicated that plaintiff was entitled to a new trial and that a new trial must follow that order; hence the verdict on the first trial could not thereafter be reinstated and judgment entered thereon.

[3. The order setting aside the verdict on the first trial having been made on the ground that a material issue of fact had not been submitted to the jury and because the trial judge was not satisfied with the conduct of the trial and the instructions to the jury as a whole,—whether another judge, before whom the cause was brought by change of venue, could, had there been no adjudication on appeal, set aside such order of his predecessor, not determined.]

4. After the time for appeal from an order or judgment has expired the court should not, in the absence of stipulation of the parties, settle a bill of exceptions covering the proceedings which led up only to the making of such order or the rendition of such a judgment.

5. Where by separate answers defendant's actionable negligence in three particulars was found in a special verdict, a further finding that "such negligence was the proximate cause of plaintiff's injury" was not insufficient on the ground that the jury might not have been unanimous as to which particular item of negligence was the proximate cause.
6. Each separate question of a special verdict is to be answered upon all the competent evidence bearing thereon and as if this were the only issue in the case.
7. To show that there was no negligence in failing to equip with a splitter a ripsaw at which plaintiff was working when injured, a witness for defendant testified that it was impracticable to equip the saw with a splitter attached in a particular way. On the cross-examination plaintiff was permitted to show by the witness that after the accident a splitter was attached to the saw in another way. *Held* proper, it not being necessary to limit the cross-examination to the exact words of the direct examination, and the evidence being admitted only for the purpose of showing the practicability of so equipping the saw.
8. An award of $5,200, reduced from $6,200 to that figure by the trial court, is *held* not excessive for serious and painful injuries to a laboring man forty-three years old, resulting in the loss of one of his eyes and impaired vision in the other.
9. Where damages awarded by the jury have been reduced by the trial court, the supreme court is reluctant to interfere further with the verdict on the ground that the amount is still excessive.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Kreutzer, Bird, Rosenberry & Okoneski,* and oral argument by *C. B. Bird.* They cited, among other cases, *Oconto B. Co. v. Cayouette,* 138 Wis. 664, 120 N. W. 497; *Wheeler v. Russell,* 93 Wis. 135, 67 N. W. 43; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Drake v. Scheunemann,* 103 Wis. 458, 79 N. W. 749; *Plano Mfg. Co. v. Rasey,* 69 Wis. 246, 34 N. W. 85; *Hixon v. Oneida Co.* 82 Wis. 515, 52 N. W. 445; *Douglas Co. v. Walbridge,* 36 Wis. 643; *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36;

Yazdzewski v. Barker, 131 Wis. 494, 111 N. W. 689; *Larson v. Knapp, Stout & Co. Co.* 98 Wis. 178, 73 N. W. 992; *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635; *Gay v. Milwaukee E. R. & L. Co.* 138 Wis. 348, 120 N. W. 283; *Sherman v. Menominee River L. Co.* 77 Wis. 14, 45 N. W. 1079; *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662; *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777; *Wysocki v. Wis. Lakes I. & C. Co.* 121 Wis. 96, 98 N. W. 950.

For the respondent there was a brief by *Humphrey Barton* and *Thomas J. Mathews,* and oral argument by *Mr. Mathews.* Among other authorities, they cited *Cameron v. Sullivan,* 15 Wis. 510; *Bonesteel v. Bonesteel,* 30 Wis. 151; *Maxwell v. Kennedy,* 50 Wis. 645, 7 N. W. 657; *Kayser v. Hartnett,* 67 Wis. 250, 30 N. W. 363; *Shafer v. Eau Claire,* 105 Wis. 239, 81 N. W. 409.

TIMLIN, J. In this action for personal injury to plaintiff caused by the alleged negligence of defendant the jury on January 10, 1907, returned a special verdict by which they found the defendant guilty of negligence which was the proximate cause of plaintiff's injury, and assessed plaintiff's damages at $5,000. But they further answered concerning the plaintiff's contributory negligence and assumption of risk as follows:

"Did the plaintiff know and appreciate, or in the exercise of ordinary care ought he to have known and appreciated, at the time when defendant put him to work with said ripsaw, the dangers incident to working with said ripsaw? *A.* Yes.

"Did the plaintiff know, or should he have known in the exercise of ordinary care, at the time of his injury, that slivers were liable to be thrown toward him by said ripsaw? *A.* Yes.

"Ought the plaintiff in the exercise of ordinary care to have reasonably anticipated such an injury as occurred to him at the time and place of the injury to him? *A.* Yes."

On motion the judge of the superior court in which this action was tried set aside this verdict and granted a new trial. In his opinion on the motion he stated that there was no question in the special verdict submitting the material issue whether the plaintiff was guilty of negligence which contributed to cause his injury. But the order awarding a new trial is stated to be "on the ground that said verdict is against the law, in that no question was submitted to the jury in said verdict covering the material issue of fact whether or not the negligence of the plaintiff, if any there was, contributed proximately to his injury, and because said verdict does not cover all the material controverted issues of fact in the case, and for the further reason that the court is not satisfied with the conduct of the trial and the instructions as a whole in submitting the case to the jury." The defendant filed an exception to this order, but thereafter joined in a stipulation setting the cause down for trial on August 27, 1907, another stipulation setting the cause for trial on September 3, 1907. The cause was then tried for the second time in the superior court, and that court directed a verdict for defendant. On motion of the plaintiff that court thereafter set aside the directed verdict and granted a new trial. The defendant appealed to this court from this second order granting a new trial, and the order was affirmed in 137 Wis. 309, 118 N. W. 1119.

After the cause was remanded from this court the defendant filed an affidavit of prejudice against the judge of the superior court, and thereupon the parties joined in a stipulation that the present attorneys for appellant be substituted as attorneys and that the place of trial of the action be changed to the circuit court for Lincoln county, and upon such stipulation the superior court ordered this change on February 17, 1909, and also made an order substituting for defendant's attorneys the present attorneys for appellant. In the circuit court the cause was tried for the third time, and the jury returned a special verdict in which they found the defendant

negligent in three particulars: (1) In failing to provide a splitter for the ripsaw in question; (2) in failing to have said ripsaw guarded with a cover; (3) in failing to warn and instruct the plaintiff concerning the danger to which he was subjected in operating the ripsaw. The fourth question of the special verdict and the answer thereunto were: "If you answer any or all of the first three questions 'Yes,' then was such negligence the proximate cause of plaintiff's injury? *A.* Yes." The plaintiff was acquitted of assumption of risk and contributory negligence and his damages fixed at $6,200.

On April 22, 1909, the defendant proposed a bill of exceptions relative to the first trial of the action. This bill of exceptions last mentioned was settled by Judge HELMS of the superior court on May 10, 1909, after the last verdict in the circuit court. Defendant then moved before the circuit judge on the record in the action and on such bill of exceptions to vacate and set aside the order of Judge HELMS of March 29, 1907, which order set aside the first verdict of January 10, 1907, and to reinstate such verdict and for judgment for the defendant thereon; also for judgment in defendant's favor on the undisputed evidence on the last trial notwithstanding the last verdict, to change certain answers in the last verdict, and, finally, for a new trial for errors occurring during the last trial and because of excessive damages. These motions were all denied, and on motion of the plaintiff the bill of exceptions settled by Judge HELMS was stricken from the files and judgment granted the plaintiff on the last verdict on condition he remit $1,000 from the amount of the verdict, which was done, whereupon judgment was rendered for the plaintiff.

Errors are assigned in striking the bill of exceptions of the first trial from the record and in refusing to vacate Judge HELMS's order of March 29, 1907, and in refusing to reinstate the first verdict and grant judgment for the defendant thereon; in denying defendant's motion for judgment not-

withstanding the verdict in the last trial, and in refusing to change the answers to certain questions in the last verdict; in not including in the last special verdict certain questions requested by defendant; in receiving evidence; in rendering judgment excessive in amount.

The judge of the superior court might properly have entered judgment for the defendant upon the first verdict. *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Monte v. Wausau P. M. Co.* 132 Wis. 205, 111 N. W. 1114; *Coolidge v. Hallauer,* 126 Wis. 244, 105 N. W. 568; *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 93 N. W. 6; *Helmke v. Thilmany,* 107 Wis. 216, 83 N. W. 360. But he did not do so, and although his written opinion upon motion to set aside that verdict indicates that he considered the verdict insufficient, yet in his order setting it aside he does so expressly upon the ground that a material issue of fact covering the contributory negligence of the plaintiff was not submitted to the jury, and for the further reason that he was not satisfied with the conduct of the trial and the instructions as a whole in submitting the case to the jury. This order followed the opinion and represents the later more authentic and official evidence of the grounds upon which the verdict was set aside. The defendant neglected to appeal from this order granting a new trial, but appealed to this court from a like order made by the superior court at the end of the second trial. It could have appealed from both orders, but omitted to do so. Sec. 3049, Stats. (1898). When the cause was determined by this court affirming the order of the superior court granting a new trial after the second trial, it was conclusively adjudicated that the plaintiff was entitled to a new trial and that a new trial must follow that order. After this adjudication the defendant could not be permitted to say that there should be no new trial in the action because of something which he failed to present to this court. *Ean v. C., M. & St. P. R. Co.* 101 Wis. 166, 76 N. W. 329, and cases; *Halsey v. Wau-*

kesha Springs Sanitarium, 128 Wis. 438, 107 N. W. 1, and cases cited. It is therefore unnecessary to consider the legal effect of joining in the stipulations or participating in the subsequent trials. But it must be understood that we do not decide, and do not proceed upon the assumption, that the judge of the circuit court could but for this adjudication set aside an order of his predecessor in the case granting a new trial upon the grounds here stated in the order so sought to be set aside. There was no error in the ruling of the circuit court striking the bill of exceptions relative to the first trial from the record and refusing to reinstate the first verdict. More than two years had elapsed from the time of making the first order for a new trial before the bill of exceptions was proposed. The statute expressly limits the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order to two years from the date of the entry of such judgment or order, except in certain instances not here relevant. Sec. 3039, Stats. (1898). This time cannot be extended. Sec. 2831, Stats. (1898). After the time for appeal from an order or judgment has expired the court should not, in the absence of stipulation of the parties, settle a bill of exceptions covering the proceedings which led up only to the making of such order or the rendition of such a judgment. *Shafer v. Eau Claire,* 105 Wis. 239, 81 N. W. 409.

With reference to the last trial, the special verdict having by the first three answers found three grounds of actionable negligence, the answer to the fourth question established that such negligence was the proximate cause of plaintiff's injuries. The verdict was quite similar to that in the case of *Roedler v. C., M. & St. P. R. Co.* 129 Wis. 270, 109 N. W. 88, and *Glettler v. Sheboygan L., P. & R. Co.* 130 Wis. 137, 109 N. W. 973, in this respect. See, however, *Peck v. Baraboo,* 141 Wis. 48, 122 N. W. 740, with reference to the requisites of a special verdict when submitted in this form.

Without restating the evidence offered at the second trial, we will merely say that we agree with the learned circuit judge that there was evidence to support the verdict returned by the jury. It is contended that in arriving at an affirmative answer to the fourth question of the special verdict some members of the jury may have considered that the absence of the splitter as found in answer to the first question was the sole cause of plaintiff's injury, other members that the absence of the cover as found in the second answer was the sole cause, and still other members that the failure to instruct or warn as found in the third answer was the sole cause; and so the plaintiff may have obtained an affirmative answer to the fourth question without the unanimous concurrence of the jury finding which particular item of negligence was the proximate cause of plaintiff's injury. Reflection must disclose that such a rule carried to its logical conclusion would defeat all general verdicts and most special verdicts. Each separate question of a special verdict is to be determined and answered upon all the competent evidence bearing thereon and as if this were the only issue in the case. There are no doubt cases in which the rule invoked by appellant obtains. *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103, and cases cited. *Gay v. Milwaukee E. R. & L. Co.* 138 Wis. 348, 120 N. W. 283, relied upon by appellant, presented a case where a single question answered by the jury in the affirmative presented two alternative propositions, and therefore is not applicable to the instant case. We do not find that this objection has ever been sustained to a situation like the present. Without at present attempting to define or set exact limits to this rule, we consider that it is not applicable to the situation here presented.

It was shown against the objection of appellant that after the accident in question the saw was equipped with a splitter. But the defendant first offered a witness who testified that a splitter could not have been fastened to the table and main-

tained there with this kind of saw. On cross-examination of this witness he was asked whether it was a fact that a splitter was used on this particular machine, and, upon objection being made, plaintiff's counsel announced that this was solely for the purpose of showing that it was practicable to put a splitter on this machine, whereupon the witness was required to answer, and he did answer that after they had studied out how to do it they had equipped the saw with a splitter. Appellant contends that his question in chief was limited to the practicability of fastening a splitter on the table behind the saw, while the cross-examination was permitted to show a splitter otherwise attached. This is quite a refined distinction. The evidence in chief was for the purpose of supporting and tended to support an inference that the defendant was not negligent because it was impracticable to equip the saw with a splitter. The cross-examination might properly be extended to matters tending to dissipate such inference, and was not limited to the exact words of the examination in chief. Under such circumstances, and for the purpose for which it was drawn out, the testimony was competent. *Lind v. Uniform S. & P. Co., ante,* p. 183, 120 N. W. 839, and cases cited.

Upon the claim that the damages awarded, after having been reduced by the trial judge from $6,200 to $5,200, are still excessive, appellant submits that the plaintiff was a laboring man forty-three years of age who lost an eye by the accident, had hospital and medical expenses of only $95, and his earning capacity was not impaired by the injury. The plaintiff offered no medical testimony and the defendant none bearing upon the extent of plaintiff's injuries. But it appears from plaintiff's evidence that the injury was a very painful one, consisting in a sliver being driven through the eyelid and deep into the eye, of the operation for the removal of the eye and of the difficulty and inconvenience from dust and suppuration which follows the loss of the eye, and of im-

paired vision in the remaining eye for the purpose of reading by artificial light. The circuit judge properly reduced the verdict, and we are reluctant to interfere with verdicts on the ground that the damages are excessive in cases where the circuit judge in the proper and fearless discharge of his duty has already exercised his judgment with respect to the amount of damages to be allowed. We find no reversible error in the record and must decline to disturb the judgment.

By the Court.—Judgment affirmed.

PETERMAN and others, Respondents, vs. KINGSLEY and others, Appellants.

October 28—November 12, 1909.

Partition: Who may maintain action: Estate in possession: Tenants in common: Lessees purchasing interest: Parties.

1. **A tenant in common of land leased to others may maintain an action for partition under sec. 3101, Stats. (1898), the lessees' possession being that of the owners; and if one or more of the lessees purchase the interest of one of such owners they succeed to his rights and may have partition.**
2. **Lessees of land are not necessary parties to an action for partition between the lessors, their rights not being affected. If the land is to be sold in such action it must be sold subject to the leases.**

APPEAL from a judgment of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

In February, 1905, *R. G. Kingsley* and John Ross were the owners of certain real estate in the city of Merrill on which had been erected a business block. During that month a portion of the block was leased by the plaintiffs *W. F.* and *A. F. Peterman* for a period of five years at an annual rental of $1,200, payable monthly in advance. Other portions of the block were leased to other tenants, and a portion of the

real estate was not leased to any one at the time this action was commenced. The said lessees, together with *R. J. Peterman,* on or about March 1, 1907, purchased the interest of John Ross in such real estate. Since such purchase the lessees have been paying to the defendant *R. G. Kingsley* one half the amount provided for in their lease. One half the rent received from the other tenants has been paid to the defendant *Kingsley,* and the remaining half to the purchasers of the Ross interest. This was an action for partition, in which it was prayed that a sale of the premises be made in case partition could not be had without prejudice to the owners of the property. The court found that the property could not be partitioned and ordered a sale thereof. The defendants *R. G.* and *Margaret Kingsley* appeal from such order.

For the appellants there was a brief by *Van Hecke & Fisher,* and oral argument by *W. E. Fisher.*

For the respondents there was a brief by *M. C. Porter,* attorney, and *F. J. & A. H. Smith,* of counsel, and oral argument by *Mr. Porter* and *Mr. F. J. Smith.*

BARNES, J. The appellants contend that at the time the *Petermans* purchased the interest of Ross in the real estate sought to be partitioned they were in possession of a portion thereof as tenants under a lease from the defendant *Kingsley* and their grantor, Ross, which has not yet expired, and that they are still in possession under such lease, and that such possession is not sufficient to support an action for partition. Furthermore, that a sale of the premises in the partition proceeding might destroy the relation of landlord and tenant existing between *Kingsley* and the *Petermans,* and that a tenant cannot change his relationship to his landlord in any such manner. Sec. 3101, Stats. (1898), provides that joint tenants, or tenants in common, of lands may have partition thereof, and that such an action may be brought by any per-

son who has an estate in possession of the lands which it is sought to partition. Manifestly *Kingsley* and Ross were tenants in common of the parcel of land in question prior to the sale of the Ross interest. The possession of their lessees was their possession, and either might bring partition proceedings under the statute. It would be anomalous to hold that owners as tenants in common did not have an estate in possession of premises occupied by their lessees. When the *Petermans* purchased the interest of their landlord Ross they acquired all the rights in the property which he possessed and became tenants in common with their co-owner, *Kingsley*, and acquired the same right to bring partition proceedings that he had. It is true they were liable to *Kingsley* for one half the stipulated rent under the lease and that their possession thereunder was his possession. But it is also true that by virtue of their purchase, and the tenancy in common with *Kingsley* which resulted therefrom, they were in possession as owners of a half interest in the premises. The situation is not different from what it would be had the lease been made after the purchase and covered the half interest of *Kingsley* only. The plaintiffs would then be in possession of a one-half interest in the property by virtue of their ownership, and of the remaining moiety by virtue of their lease. This latter possession would also be the possession of *Kingsley*. The plaintiffs have clearly brought themselves within the provisions of sec. 3101, Stats. (1898), and were entitled to bring this action. *Hill v. Reno*, 112 Ill. 154; *Eberts v. Fisher*, 44 Mich. 551, 7 N. W. 211; *Hunt v. Hazelton*, 5 N. H. 216.

It is claimed that the various lessees in possession of the premises were necessary parties to the suit. A lessee has no right to prevent his landlord from selling the leased property subject to the lease, at least in the absence of covenants therein affecting such right. Neither can the landowner avoid a lease by making a sale of the demised property, unless it is so stipulated in the lease. Neither could the rights of the ten-

ants in this case be affected by the partition suit. We perceive no good reason why the lessees should be made parties to the action, or how their rights could be affected thereby, unless it should be held that they might resist a probable change of landlords. This they could not do. *Woodworth v. Campbell,* 5 Paige, 518. The court properly directed the premises to be sold subject to the leases, and the lessees had no such interest in the action as would entitle them to litigate the right of their landlords to make a sale of the premises, through legal proceedings or otherwise, subject to the outstanding leases.

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ment roll and under sec. 3070 is reviewable on appeal from the judgment, whether excepted to or not. *Roach v. Sanborn L. Co.* 435

2. The conclusion of law involved in such order is reviewable on appeal without exception to the findings of fact upon which it is based or settlement of a bill of exceptions containing all the evidence. *Ibid.*

3. Rulings refusing requested instructions will not be reviewed on appeal in the absence of exceptions thereto. *Monaghan v. N. W. Fuel Co.* 457

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4. Where findings necessary to support the judgment were sufficiently excepted to and are unsupported by competent evidence the judgment will be reversed, and it is immaterial that the exception to another finding was insufficient. *T. D. Kellogg L. & M. Co. v. Webster M. Co.* 341

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6. Assignments of error that the court erred in the admission of evidence, in the rejection of evidence, in its findings of fact, in conclusions of law, and in not finding that defendants committed the trespass alleged in the complaint, are inadequate because too general. *Stark v. Duhring,* 521

7. Assignments of error on the admission of evidence will not be considered where the particular portions claimed to have been improperly admitted are not pointed out and the pages of the printed case referred to generally do not contain the evidence claimed to be incompetent. *Stumm v. W. U. Tel. Co.* 528

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8. Although the costs taxed for drawing a bill of exceptions may in this case have included something more than the improperly allowed costs of the reporter's transcript, this court will not count folios to determine that fact, counsel having furnished no separation or basis for separation of the items. *Dralle v. Reedsburg,* 319

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12. Where there is evidence to support the findings of a referee, confirmed by the trial court, they will not be set aside on appeal unless the clear preponderance of the evidence is against them. *Witt v. Merz*, 29

13. Where there is evidence to support a finding, and the finding is not clearly against the preponderance of the evidence, it will not be set aside. *Tilton v. J. L. Gates L. Co.* 197

14. On appeal to this court from the judgment of the circuit court given under sec. 3769, Stats. (1898), the rule obtains that the determination by such court as to facts should not be disturbed unless contrary to the clear preponderance of the evidence. *Luckow v. Boettger*, 62

15. A determination by the circuit court of issues of fact by application of wrong rules of law is not supported on appeal by the presumption in favor of its correctness, requiring a clear preponderance of evidence to the contrary to warrant disturbing it. *Ibid.*

16. Where in an action for death the question whether decedent was guilty of contributory negligence as a matter of law is under the evidence extremely close, the appellate court must place considerable reliance upon the decision of the trial court. *Lind v. Uniform S. & P. Co.* 183

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18. In the absence of a showing that appellant is entitled to recover more than the amount for which he had judgment and which respondent concedes, the judgment should be affirmed. *Richards v. Manitowoc & N. T. Co.* 85

19. Where, in an action to recover commissions, it appeared that certain commissions became due before the trial, and the sales on which they were based were admitted without controversy as to the amount, objection that the commissions were not due at the time the action was commenced is technical and error in their allowance should be disregarded under sec. 2829, Stats. (1898). *Tilton v. J. L. Gates L. Co.* 197

20. Where the sufficiency of a complaint was not challenged by general demurrer, and the true contract of the parties, set up in the answer but imperfectly set up in the complaint, was established at the trial, and the parties litigated the issues aris-

ing out of such contract, error, if any, in overruling a demurrer *ore tenus* to the complaint on the ground that the imperfectly recited contract showed that plaintiffs had not performed it, should be disregarded under sec. 2829, Stats. (1898). *Ibid.*

[21. How far sec. 3072*m*, Stats. (Laws of 1909, ch. 192), changes the rules adopted and acted upon by this court long before the passage of that act, and how far, if at all, it extends the provisions of sec. 2829, Stats. (1898), not determined.] *Bates v. C., M. & St. P. R. Co.* 235

22. Where erroneous rulings on evidence vitally affect the whole amount in controversy the judgment cannot be affirmed under ch. 192, Laws of 1909, although the actual difference between the parties will not cover the cost of a new trial; nor can the appeal be dismissed or the judgment be affirmed under the rule *de minimis non curat lex*, so long as the parties have the right of appeal regardless of the amount involved. *Monture v. Regling*, 407

23. Instructions relative to a question upon which the jury found in appellant's favor cannot be assigned as error by him. *Lehman v. C., St. P., M. & O. R. Co.* 497

24. Appellant was not prejudiced by the admission of evidence relating to a question upon which the jury found in his favor and having no bearing upon any question upon which they found against him. *Ibid.*

25. Upon a trial by the court, errors in the admission of evidence are not material if the findings are supported by other evidence properly admitted. *Stark v. Duhring*, 521

26. The erroneous admission of evidence is not prejudicial to appellants when it supports their claim and impeaches the case of the respondent. *White v. White*, 538

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27. The decision on a former appeal is the law of the case and, whether right or wrong, is controlling upon a second appeal in the same action. *Roach v. Sanborn L. Co.* 435

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28. Where, upon appeal to this court, findings of a trial court are condemned because made by application of wrong rules of law and the right of the matter does not clearly appear from the evidence, the case upon reversal will be remanded to the trial jurisdiction to find the facts, proceeding in the light of correct legal principles. *Luckow v. Boettger*, 62

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1. An attachment of land does not deprive the owner of its use, occupancy, or enjoyment, except that he may be unable to sell until the attachment is dissolved; and interest on the value of the land is not the basis for ascertainment of the damages suffered in consequence of the attachment. *Tilton v. J. L. Gates L. Co.* 197

2. Compensatory damages allowed because of a wrongful attachment should not exceed such actual damages as are the natural and proximate result or consequence of the wrongful act in suing out the attachment. *Ibid.*

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BANKRUPTCY.

1. Payments discharging a trust fund in the hands of one subsequently adjudicated a bankrupt cannot be recovered as preferences. *Ferguson v. Bauernfeind,* 43

2. In an action by a trustee in bankruptcy to recover alleged preferential payments, a finding that the relation of debtor and creditor existed between the defendant and the bankrupt is not sustained where the evidence clearly shows a trust relation by which the bankrupt took, received, and held defendant's money for the purpose of loaning it, even though he may have mingled it with his own money. *Ibid.*

3. Under the federal bankruptcy act the trustee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time of the vesting of the trustee's title. *Ibid.*

BANKS AND BANKING.

Certificates of deposit: Representations of cashier.

1. Evidence tending to show that plaintiff's husband, having money in the hands of the cashier of defendant bank, told the cashier and plaintiff that he wished to give the money to plaintiff, told the cashier to give her a certificate of deposit therefor, and advised plaintiff to get such a certificate; that the cashier, who had full charge of the business of the bank, informed plaintiff that if she left the money in the bank for six months she would get three per cent. interest, but if she took it out before that time she would get no interest, and at the same time wrote out his personal check on the bank and handed it to her; that she took the check supposing it to be a certificate of deposit, and kept it for several months without demanding payment thereon and without knowledge of its true character; that she was inexperienced in business; and that there was nothing unless it was the check to suggest a loan by plaintiff to the cashier per-

sonally,—is *held* sufficient to warrant the jury in finding a contract of deposit between plaintiff and the bank. *Castello v. Citizens State Bank,* 275

2. Assuming, as found by the jury, that prior to delivery of the check to plaintiff there was an oral contract of deposit between the bank, acting through its cashier, and the plaintiff, it cannot be held as matter of law that the substitution of the cashier's personal check therefor and its acceptance and retention by plaintiff under the circumstances stated revoked or discharged such oral contract or estopped the plaintiff to enforce it, even though it appeared that had she carefully examined the check she would have known the difference between it and a certificate of deposit, and had she presented it for payment within sixty days it would have been paid. *Ibid.*

Violations of banking laws. See CRIMINAL LAW, 18-21.

Same: Pleading: Election between counts.

3. Three counts charging a bank cashier (1) with making false entries in the certificate register of the bank, (2) with making false entries in a ledger as to the amounts due from another bank, and (3) with making a false report to the commissioner of banking as to the amount due on time certificates and as to the amount due from other banks, all in violation of sec. 17, subch. II, ch. 234, Laws of 1903, were properly included in one information; and it was not error to refuse to compel the prosecuting attorney to elect between them. *Ruth v. State,* 373

Same: Evidence.

4. In a prosecution for making a false report to the commissioner of banking, defendant was not prejudiced by testimony of experts that the books of another bank showed that he had falsified book entries and his report of the amount due from other banks to his bank, although there was no evidence of the contents of the books of the other bank or of their correctness,—it appearing otherwise conclusively from the report that defendant knowingly made a false report based on incorrect statements in the books of his bank, so that the testimony of the experts was simply corroborative of defendant's admitted knowledge of the falsity of the book entries and of his report to the commissioner of banking based thereon. *Ibid.*

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See APPEAL, 19.

1. A contract for commissions "to become due on one-quarter payment of the selling price of any piece of land sold" is apportionable and not entire, and under it whenever a payment is made amounting to twenty-five per cent. or more of the selling price of a tract of land, the commission becomes not only due but payable. *Tilton v. J. L. Gates L. Co.* 197

2. An owner having breached his contract to pay to brokers instalments of commissions as lands were sold, the brokers are relieved from continuing to make sales and are entitled to commissions on sales made, although there was no showing that the brokers were prevented from making further sales or were hindered in performance by the owner's refusal to make payments as agreed. *Ibid.*

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CANCELLATION OF INSTRUMENTS.

1. Where the original owner of land had been in actual possession of it during the three years following the recording of a tax deed, thereby preventing the running of the statute of limitations in favor of the deed, a representation by the holder of the deed that the statute had run in its favor, made for the purpose of inducing a conveyance by the heirs of the original owner, was not a mere legal opinion but was a false representation of a fact material to the transaction and, even though made honestly, was such a fraud as in equity would render voidable a conveyance reasonably induced thereby. *Kathan v. Comstock*, 427

2. Where in such a case the false representation was as to one only of several tracts covered by the conveyance, but there was no evidence enabling the court to apportion the consideration paid, and defendants had refused an offer giving them an option as to whether the conveyance should be set aside wholly or only as to the one tract, it was not error for the trial court to set aside the entire conveyance. *Ibid.*

CARRIERS.

Relation between carrier and passenger: Personal injuries.

1. The rule that, generally, a master has the right to construct and maintain his property and appliances in his own way, and if there is no latent or hidden danger a servant assumes the risk of injury from the obvious character of such appliances, has no application as between carrier and passenger. *Bates v. C., M. & St. P. R. Co.* 235

2. The expression "a question of engineering," meaning a question of judgment in the construction of a building or appliance, relates to a condition of fact pertinent in cases between master and servant, and not to any rule of law by which a court or jury is disabled from deciding a cause merely because the decision may involve such a question. *Ibid.*

3. As to a passenger who was injured while in a railway baggage room at the invitation of the baggage master for the purpose

of identifying her baggage, it was the duty of the railway company to have such room reasonably safe. *Ibid.*

4. In an action for injuries to such a passenger, who accidentally stepped between the edge of a baggage truck and the edge of a pit in which the truck stood with its platform on a level with the floor, the question whether the baggage room, with such unguarded pit extending nearly across it, constructed to facilitate the loading and unloading of baggage, was reasonably safe for the use of passengers claiming or identifying baggage therein, is *held* to have been a question for the jury. *Ibid.*

5. The court properly refused in such action to submit for special verdict the question, "Could it have been reasonably anticipated that the accident in question would have occurred at the time and place in question?" The inquiry should have been whether defendant could reasonably have anticipated that an injury might probably result to a passenger by reason of the construction and maintenance of this baggage room used as it was. *Ibid.*

Same: Contributory negligence.

6. Plaintiff's testimony in such case that she did not see the pit is *held* not so manifestly impossible and untrue as to warrant holding as matter of law that she was guilty of contributory negligence. *Ibid.*

7. The jury having found by special verdict that the baggage room was not reasonably safe, that this was the proximate cause of the injury, and that there was no contributory negligence on the part of the plaintiff, whether or not a further express finding that defendant was negligent was necessary to fix its liability is not determined. *Ibid.*

8. It was, as matter of law, negligence for a man of full age and ordinary intelligence, confronted with no exigency and laboring under no fright or excitement, to attempt to alight from a street car which to his knowledge was moving at the rate of six miles an hour, although the conductor had negligently failed to stop the car as requested and the passenger—who had recently come to this country, and was unable to speak English, and was inexperienced in street railway travel—had at other times seen passengers alight from moving cars, and concluded that he was required to do so, and supposed it was perfectly safe. *Fosnes v. Duluth St. R. Co.* 455

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See HUSBAND AND WIFE, 3.

In an action for damages for a malicious conspiracy to cause plaintiff's commitment to an asylum for the insane, the evidence is *held*, as a matter of law, to show that defendants were justified in instituting the judicial inquiry as to plaintiff's sanity, it appearing that they acted in good faith upon information which came to them from sources entitling it to credit and which was of such nature as to justify a belief in the minds of men of reasonable intelligence and prudence that plaintiff was mentally deranged. *Scheunert v. Albers*, 578

CONSTITUTIONAL LAW.

Legislative powers: Delegation. See COURTS, 8, 9. RAILROADS, 8, 20.

1. In matters purely local and municipal, the legislature may enact a conditional law and refer it to the people or proper municipal authorities to decide whether such law shall or shall not have force and effect in their respective municipalities. *State ex rel. Williams v. Sawyer Co.* 634

2. Such a law must be a complete enactment in itself; and the only thing that may be left to the people to determine is whether they will avail themselves of its provisions. *Ibid.*

3. Ch. 651, Laws of 1907, is void under sec. 2, art. VII, Const., so far as it attempts to delegate to the county board power to decide upon the number of courts to be established in the county, but is valid to the extent of creating and establishing one municipal court in each county (at least in such counties as had no municipal court when the act was passed), and to such extent only does it become operative when adopted in the manner therein provided. *Ibid.*

4. Certain administrative, and perhaps other, functions may properly be conferred by such a general law upon the county board to enable it to execute and carry into effect the law when adopted, as the providing of an office for the judge, determining his salary and the places where he shall hold court, and the like. *Ibid.*

Laws: Enactment: Title.

5. The title of a private or local act should be liberally construed, and the act should not be declared void under sec. 18, art. IV, Const., merely because such title does not express the subject as fully or as unequivocally as possible. *In re Southern Wis. Power Co.* 245

6. A private or local act should not be held invalid because of insufficiency of its title unless, giving such title the largest scope which reason will permit, something is found in the body of the act which is neither within the literal meaning nor the spirit of the title nor germane thereto. *Ibid.*

7. The title to ch. 462, Laws of 1901, is "An act to authorize [certain persons named] to build and maintain a dam across and to improve the navigation of the Wisconsin river," etc., the particular place where the dam is to be built not being specified. *Held* that, assuming the act to be local rather than private, the subject of the act is sufficiently localized in its title to meet the requirements of sec. 18, art. IV, Const. *Durkee v. Janesville*, 26 Wis. 697; *Anderton v. Milwaukee*, 82 Wis. 279; and *Milwaukee Co. v. Isenring*, 109 Wis. 9, distinguished. *Ibid.*

Judicial powers. See COURTS, 1, 2.

Navigable rivers.

8. A statute authorizing individuals "to build and maintain a dam across and to improve the navigation of the Wisconsin river above the same and for the purpose of creating hydraulic power" is not in violation of sec. 1, art. IX, Const. (providing that the navigable waters leading into the Mississippi "shall be common highways and forever free," etc.), and in the absence of legislation on the subject by Congress is within the plenary power of the legislature. *In re Southern Wis. Power Co.* 245

9. When the legislature has granted such authority, and the state does not question that the improvement made is in conformity with the power delegated, neither the necessity nor the usefulness of the improvement, nor the manner in which it is made, can be called in question by private parties, even those whose land is sought to be condemned in aid of the improvement. *Ibid.*

Special legislation: Private corporations: Franchise to construct and maintain dam. See MUNICIPAL CORPORATIONS, 23.

10. A franchise granted by the legislature to construct and maintain a dam across a river is not a corporate power or privilege within the meaning of sec. 31, art. IV, Const., prohibiting the legislature from enacting any special or private law granting corporate powers or privileges except to cities. Especially is this so where the act granting such a franchise (in this case ch. 462, Laws of 1901) specifically provides that no corporate powers are granted or intended to be granted by it. *In re Southern Wis. Power Co.* 245

11. A franchise, such as the right to build a dam across a river, which is not a corporate franchise may be conferred by a special or private law upon a corporation already existing. *Stevens Point B. Co. v. Reilly*, 44 Wis. 295, so far as it holds to the contrary, overruled. *Ibid.*

Same: Alteration or repeal of charters.

12. The power of the state to alter or repeal existing charters of corporations cannot be used to take away property or rights

which have become vested under a legitimate exercise of the powers granted by a charter. *State ex rel. N. P. R. Co. v. Railroad Comm.* 145

13. BARNES, J., and WINSLOW, C. J., *dissenting*, are of the opinion that there is no limitation on the right of the legislature, under sec. 1, art. XI, Const., to repeal corporate charters, except the consciences of the legislators, and no limitation on the right of amendment, except the XIVth amendment to the federal constitution. *Ibid.*

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Same: Consideration.

1. In an action against plaintiff's sister to recover the value of services rendered and expenses incurred at her request in supporting her father, evidence that defendant had received or been promised her father's property as consideration for supporting him before she requested plaintiff to do so, would have been competent as tending to show a mutual understanding that she would compensate plaintiff; but mere statements made by plaintiff on his cross-examination (which were properly stricken out because not responsive to any question) that he expected pay from defendant because she got the father's property, would not, if they had remained in the case, have tended to show that defendant received the property pursuant to any promise made before said request. *Koenig v. Koenig*, 618

2. The mere facts that a son was requested by his sister to support their father; that he did so for twelve years without suggesting, until after the father's death, that he expected compensation from the sister; that the sister received by the will the father's property; and that the son claimed compensation out of the father's estate,—were not sufficient to carry to the jury the question whether there was an agreement or understanding that the sister was to compensate him. *Ibid.*

Entire contracts. See BROKERS, 1. CONTRACTS, 6, 7. MASTER AND SERVANT, 6.

Executory. See DAMAGES, 7–10. INSURANCE, 5–8.

Construction. See BANKS AND BANKING, 1, 2. SALES, 1–4.

Illegal contracts. See INSURANCE, 4–8.

Performance or breach: Executory contracts. See BROKERS, 2. DAMAGES, 1–4, 7–10, 17. MASTER AND SERVANT, 5.

3. Where specific performance of an executory contract cannot be enforced, either party may by explicit order stop performance by the other, subjecting himself thereby only to a liability to the other party for compensatory damages for such breach. *Badger S. L. Co. v. G. W. Jones L. Co.* 73

4. A contract for the sale of lumber to be manufactured, graded, tallied, hauled, and delivered on board cars at such times as cars are furnished by the purchaser, title to remain in the seller until the lumber is shipped and paid for, is executory so far as it relates to lumber not delivered at the time of a renunciation of the contract by the purchaser. *Ibid.*

5. The rights of the parties under such a contract must be determined as of the date the purchaser renounces his contract and refuses to carry it out. *Ibid.*

6. A contract requiring a commodity to be shipped in carload lots as cars are furnished by the purchaser, each car shipped before a designated date to be paid for in cash fifteen days from date of shipment, is apportionable and not entire. *Ibid.*

7. Under such a contract the purchaser may receive part of the commodity and may breach the contract as to the portion not delivered without subjecting himself to liability for the purchase price thereof, provided the contract has not been performed by the seller as to the undelivered portion. *Ibid.*

8. The refusal of one party to perform his part of an executory contract unless the other party consents to a modification constitutes a total breach of the contract. *Richards v. Manitowoc & N. T. Co.* 85

9. If, while a contract to do work and furnish materials is still executory, the party for whom it is to be done orders the work stopped, the remedy of the other party is to recover damages for such breach. He cannot proceed with performance and recover the value of the completed job. *Ibid.*

10. A person may, at law, breach his contract with another and be liable only to respond to that other for such legal damages as will remedy the loss to him. *Malueg v. Hatten L. Co.* 381

11. The rights of parties as regards a breach of contract become fixed at the time the breach occurs. *Ibid.*

Rescission. See LARCENY, 1. SALES, 5–7. VENDOR AND PURCHASER, 3, 4, 6.

12. Ordinarily, facts which will warrant a rescission must have existed at the time the contract was made. *Badger S. L. Co. v. G. W. Jones L. Co.* 73

13. In an action to recover the contract price of lumber the defendant, having by answer denied plaintiff's right to recover on such cause of action, may, by counterclaim, plead that if it should be held liable to take and pay for any portion of the lumber it should be allowed damages by way of recoupment and setoff because of poor manufacture, without thereby waiving any rights it might have under an attempted rescission. *Ibid.*

14. In an action for rescission of an executed purchase of corporate stock under an agreement by which plaintiff had conveyed land to defendant in payment for said stock and defendant had

agreed that certain dividends would be paid thereon and had further agreed that at any time, on plaintiff's request, he would give the latter stock in another corporation in place of that first mentioned, the complaint alleged that defendant by false representations had induced plaintiff to make a partial exchange of the stock, and alleged that no dividends had been paid as agreed. *Held*, that the allegations as to false representations inducing the exchange of stock were irrelevant to the relief sought. *Forster v. Flack*, 48

15. Breach of a condition subsequent, of an express warranty, or of a covenant, in the absence of other grounds of equitable jurisdiction, will not support a complaint in equity for rescission of a contract, the remedy at law being adequate. *Ibid.*

16. A fully executed agreement, whereby plaintiff conveyed land to defendant in consideration of certain corporate stock, cannot be rescinded in equity solely for breach of defendant's undertaking that the stock would pay agreed dividends. *Ibid.*

17. In such case a complaint alleging breach of the agreement that the shares of stock transferred to plaintiff would pay certain dividends, without allegation as to the value of either the stock or land, states no legal cause of action, since failure to declare or pay dividends does not necessarily affect the intrinsic value of the shares. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See APPEAL, 16. CARRIERS, 6–8. HIGHWAYS, 12. MASTER AND SERVANT, 4, 10, 22–31. NEGLIGENCE, 3. RAILROADS, 28. STREET RAILWAYS, 3, 4.

CONVEYANCES. See CANCELLATION OF INSTRUMENTS. DEEDS. TAX TITLES. VENDOR AND PURCHASER.

CORPORATIONS.

Incorporation. See RELIGIOUS SOCIETIES, 1.

Corporate existence and franchise. See STREET RAILWAYS, 1.

Capital stock. See CONTRACTS, 14, 16, 17.

1. A corporation has power to purchase shares of its own capital stock when such purchase is made with no illegitimate or fraudulent purpose and no rights of creditors suffer thereby. *Gilchrist v. Highfield*, 476

Members and stockholders. See CONTRACTS, 14, 16, 17. CORPORATIONS, 5. RELIGIOUS SOCIETIES, 2.

Officers. See CORPORATIONS, 5, 7.

Corporate powers: Property and conveyances: Purchase of franchises.

2. The franchise to build a dam across the Wisconsin river granted by ch. 462, Laws of 1901, being expressly made assignable, a corporation organized for the purpose under ch. 86, Stats. (1898), had the right, under sec. 1775*a*, to take an assignment of such franchise. *In re Southern Wis. Power Co.* 245

3. Under sec. 1775*a*, Stats. (1898), the acquirement and use of such a franchise is a lawful business or purpose, for which, under sec. 1771, a corporation may be organized. *Ibid.*

4. The provision in sec. 4, ch. 462, Laws of 1901, that no corporate powers are granted or intended to be granted by that act, does not prohibit a corporation otherwise created from acquiring and exercising the rights and franchises granted by said act. *Ibid.*

Dissolution: Repeal of charter. See CONSTITUTIONAL LAW, 12, 13.

Same: Who may maintain action.

5. Where the directors of a dissolved corporation have wholly failed and refused to perform the duties imposed by sec. 1764, Stats. (1898), to settle its affairs and distribute its assets, thus depriving a stockholder of his share of the assets and correspondingly enriching themselves, the stockholder may maintain an action in equity to wind up the affairs of the corporation and for the appointment of a receiver to perform the functions which the directors have refused to perform. *Seering v. Black*, 413

6. In such an action there was no impropriety in alleging that plaintiff was also a creditor of the corporation and in setting forth a fairly complete history of its condition and affairs. *Ibid.*

7. Although the prayer of the complaint in such an action might be considered as asking for relief which could not be granted therein, viz., a money judgment in favor of plaintiff as a creditor and a like judgment in favor of the corporation against its officers, yet it might also be construed as asking merely that the claims so involved be duly paid or enforced by the receiver, and, so construed, the complaint states but a single cause of action. *Ibid.*

[8. Whether a creditor other than a judgment creditor may maintain an action to wind up the affairs of a corporation dissolved by operation of law, not determined.] *Ibid.*

Religious societies. See RELIGIOUS SOCIETIES.

CORROBORATION. See CRIMINAL LAW, 15, 16.

COSTS.

See APPEAL, 8, 29.

1. A ruling of the trial court withholding costs in an equitable action will not be disturbed on appeal unless there was an abuse of discretion. *Olwell v. Travis*, 547

2. Witness fees paid to jurors for attendance upon the hearing of a motion for a new trial, which was based in part on alleged misconduct of one of the jurors, are *held* to have been properly allowed in the taxation of costs. *State ex rel. Wagner v. Dahl*, 301

3. That part of subd. 6, sec. 2918, Stats. (1898), allowing costs to the plaintiff in an action on contract when he shall recover $100 or more, is not a qualification or repeal of subd. 7, although it was originally enacted later than subd. 7 and overlaps the ground covered thereby; and in a case coming within the terms of subd. 7, where the recovery was more than $50 but less than $100, plaintiff was entitled to costs. *Olson v. U. S. Sugar Co.* 309

4. Costs taxable for drawing a bill of exceptions should not be held to include that part thereof composed of a transcript of the reporter's notes, drawn by the reporter, for the cost of which the successful party has already been fully reimbursed by the other party. *Dralle v. Reedsburg*, 319

COUNTERCLAIM. See CONTRACTS, 13. EJECTMENT, 4. PLEADING, 5.

COUNTY BOARD. See CONSTITUTIONAL LAW, 3, 4. COURTS, 8, 9. TAXATION, 4.

COUNTY COURTS. See INDIANS, 1, 2. INSANE PERSONS.

COURT AND JURY. See CARRIERS, 4. CONTRACTS, 2. CRIMINAL LAW, 10, 11. DAMAGES, 5. INSURANCE, 2. MASTER AND SERVANT, 3, 4, 8, 16. RAILROADS, 30, 32, 33. TELEGRAPHS AND TELEPHONES, 3. TRIAL, 2.

COURTS.

Establishment and organization: Place and time of holding court outside of circuit.

1. The provision of sec. 11, art. VII, Const., that "the judges of the circuit court may hold courts for each other," should be liberally construed, the authority so conferred being intended to include generally the judicial business which a circuit judge is authorized by law to transact. One circuit judge may therefore, in a proper case, make orders at chambers in another circuit. *In re Southern Wis. Power Co.* 245

2. Even if the provision above quoted expressly authorizes a circuit judge to hold court only at a regular term outside of his circuit, it does not preclude the legislature from conferring larger powers, as has been done in sec. 2432, Stats. (1898). *Ibid.*

Same: Jurisdiction. See INDIANS, 1. JUDGMENT. MUNICIPAL CORPORATIONS, 5, 6, 11, 13, 14.

Same: Conduct of business: Appointment of attendants.

3. The power to appoint necessary attendants upon the circuit court is inherent in that court in order to enable it to properly perform the duties delegated by the constitution, and is recognized by sec. 2431, Stats. (1898), as amended by ch. 224, Laws of 1903. *Stevenson v. Milwaukee Co.* 14

4. In the exercise of its inherent power to appoint necessary attendants it is for the presiding judge of the circuit court to determine the necessity. In that respect he is vested with a broad and liberal discretion. *Ibid.*

[5. Whether the power of such judge in determining the necessity of appointment of attendants is subject to review in any case, not decided.] *Ibid.*

6. Where it seems necessary a circuit judge may appoint a court attendant in addition to the sheriff and his deputies for such time as the necessity exists, notwithstanding the statutory authority given the sheriff to appoint special deputies under a special order of such judge authorizing an additional number of deputy sheriffs. *Ibid.*

7. The compensation of necessary attendants appointed by the circuit judge is the *per diem* allowed deputy sheriffs for the time expended during sessions of the court, to be recovered by certification in the same manner as fees of jurors are paid. *Ibid.*

Supreme court. See APPEAL. CRIMINAL LAW, 25, 26. DAMAGES, 5.

Circuit courts. See JUSTICES' COURTS.

County courts. See INDIANS, 1, 2. INSANE PERSONS.

Municipal courts. See CONSTITUTIONAL LAW, 3, 4.

8. The requirement in sec. 2523—2, Stats.: ch. 651, Laws of 1907 (providing for special municipal courts in each county), that the law shall be adopted by resolution before any action shall

be taken by the county board to provide for the court, is mandatory; and where a county board attempted in a single resolution to adopt the law and make provision for a court thereunder, the latter part of the resolution, at least, was void. *State ex rel. Williams v. Sawyer Co.* 634

9. Whether, in such case, so much of the resolution as adopted the law was valid, not determined. If valid it cannot be rescinded by subsequent action of the county board, at least in the absence of express legislative authority so to do; but so much of the resolution as was void could properly be rescinded. *Ibid.*

Justices' courts. See JUSTICES' COURTS.

COVENANTS. See CONTRACTS, 15.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See BANKS AND BANKING, 3, 4. EMBEZZLEMENT. FOOD, 2. HOMICIDE. INDICTMENT AND INFORMATION, 1. LARCENY. RAPE.

Preliminary examination: Commitment. See HABEAS CORPUS.

1. A legal preliminary examination may be had without calling the complainant as a witness, the provision in sec. 4786, Stats. (1898), that the magistrate shall examine him being directory merely. *Lundstrum v. State,* 141

2. A confession of guilt by the accused may be received and considered by the examining magistrate in connection with other evidence as tending to prove that an offense has been committed and that there is probable cause to believe the accused guilty thereof. *Ibid.*

3. The evidence (including the confession) on the preliminary examination of one charged with murder is *held* sufficient to justify the magistrate in holding her for trial. *Ibid.*

Trial: Reception of evidence. See BANKS AND BANKING, 4. CRIMINAL LAW, 2, 3. FOOD, 1. HOMICIDE, 1, 2.

4. Circumstantial evidence is an instrumentality in the administration of justice quite as legitimate as direct evidence for the establishment of an evidentiary circumstance, or the main fact in controversy in a judicial trial. *Spick v. State,* 104

5. The degree of certainty respecting the existence of the main fact in controversy in a judicial trial, in order to warrant a finding in favor of the party affirming such existence, is the same where the evidence relied upon is partly or wholly circumstantial as where it is direct. *Ibid.*

6. In case the evidence, whether wholly circumstantial or not, produces a conviction to a moral certainty—that is, beyond a reasonable doubt—in the minds of the jury of the existence of the ultimate fact in controversy, a verdict is due accordingly the same as if conviction with like degree of certainty were produced by direct evidence. *Ibid.*

7. Proof of motive is not essential to a conviction in a prosecution of a person upon a charge of his having committed a criminal offense, but circumstantially it is of more or less weight as to the material fact according to the nature of the situation; and in a case resting wholly upon circumstantial evidence the presence or absence of motive may well be the deciding factor. *Ibid.*

8. If the jury believe that any witness has wilfully testified falsely respecting any material matter, they may, if they see fit, but are not bound to, reject all of such witness's evidence on that ground alone, where not corroborated by some other credible evidence. *Ibid.*

9. A person on trial, charged with having committed a criminal offense, is presumed to be innocent; and such presumption entitles him to an acquittal till overcome by evidence establishing his guilt to the satisfaction of the jury beyond a reasonable doubt. *Ibid.*

Same: Province of court and jury.

10. The weight of evidence to establish an evidentiary circumstance, and the weight of such circumstance as evidence when established, is for the jury. *Spick v. State,* 104

11. Whether evidence offered tends to establish an evidentiary circumstance, or such circumstance to establish the main fact in controversy, is a question for the court. The decision in that regard, being in the field of mere competency, should not be disturbed on appeal unless manifestly wrong, the matter to be viewed having regard to the superior advantages of the trial over the reviewing court for determining such question. *Ibid.*

Same: Necessity, requisites, and sufficiency of instructions. See CRIMINAL LAW, 22.

12. It is proper, though not necessary, in instructing a jury in a criminal case, where conviction is dependent partly or wholly on circumstantial evidence, to use this language or something similar: The accused is entitled to an acquittal unless the evidence satisfies the jury to a moral certainty of the existence of all the material circumstances; that they are consistent with guilt and inconsistent with any other reasonable hypothesis. *Spick v. State,* 104

13. In a criminal case it is sufficient to instruct the jury in any appropriate language, as to the degree of certainty of guilt requisite to a conviction, to the effect that: In order to warrant a conviction each and all of the material circumstances and the fact of guilt should be established to the satisfaction of the jury beyond every reasonable doubt. *Ibid.*

14. A jury may be instructed that the evidence on the part of the state tends to establish its claim and that on the part of the defendant the contrary, it being made plain that the real right of the matter is wholly for them to determine from all the evidence produced. *Ibid.*

15. A witness may be impeached by proving by the evidence of other witnesses that his evidence is false; also by proving he has made statements out of court inconsistent with those made under oath in court. But a jury should not be instructed that if they believe from all the evidence that the testimony of any witness is false they may reject it, as if they had discretion whether to reject or not reject such evidence, nor be instructed that whether to reject such evidence or not is conditioned upon whether the same is corroborated by other credible evidence. *Ibid.*

16. Belief upon the whole evidence that the testimony of any witness is false precludes the existence of its being corroborated by any credible evidence so as to be entitled to be believed. Any suggestion to the contrary involves absurdity and is to be

avoided because of danger of the subject being confused with the rule of *falsus in uno, falsus in omnibus.* *Ibid.*

17. A jury may properly be admonished of the importance of agreeing upon a verdict and told, if such appears reasonably to the trial judge to be the situation, that the evidence is not so voluminous or hard to understand, but that a conclusion can be reached one way or the other within a reasonable time, and that such result is expected, care being taken not to suggest which way is proper or to go further than to stimulate appreciation of jury duty. *Ibid.*

18. An information charging the making of a false report to the commissioner of banking respecting two specific matters was read to the jury, and they were instructed as stated in the opinion. *Held*, that it must be presumed that the jury applied this general language to the specific matters charged in the information read to them, and that the instruction was not prejudicial to the defendant. *Ruth v. State*, 373

Same: Verdict. See CRIMINAL LAW, 6. HOMICIDE, 3–5.

19. Under a count in an information charging that defendant wilfully made a false report to the commissioner of banking respecting (1) the amount due from other banks and (2) the amount of outstanding time certificates of deposits, a verdict of guilty may be sustained upon proof that the report was false as to either one of the two matters specified, if it appears that the jury agreed as to that one. *Ruth v. State*, 373

20. In such a case a verdict of not guilty on another count charging the making of false entries in the bank's register of certificates (with which entries the report as to such certificates agreed) is *held* to show that the verdict of guilty as to the report was based on an agreement of the jury that such report was false in respect to the amount due from other banks. *Ibid.*

21. It will be presumed that the verdict of the jury rests upon the facts established by the evidence. *Ibid.*

Appeal and error: Review: Affirmance and reversal. See BANKS AND BANKING, 3, 4.

22. While it would be well to specially instruct a jury on the subject of circumstantial evidence where the truth of a controversy is to be discovered partly or wholly from such evidence, omission to do so is not fatal error unless proper instructions in respect thereto are presented and rejected. *Spick v. State*, 104

23. The decision of the trial court as to the competency of evidence should not be disturbed unless manifestly wrong. *Ibid.*

24. In case a decision by a trial court on the question of competency when made was wrong, but is right viewed from the standpoint of the whole evidence at the close of the trial, the error is harmless. *Ibid.*

25. Sec. 4719, Stats. (1898), vests in the supreme court a broad and liberal discretion in ordering a new trial in criminal actions where the justice of the case demands. *Prinslow v. State*, 131

26. A new trial is directed by the supreme court although it had been denied by the trial court, in a prosecution for embezzlement, under the evidence, stated in the opinion. *Ibid.*

27. After retiring, the jury returned into court announcing a disagreement upon a certain point. Counsel for the defendant sug-

gested that the testimony of the complaining witness on that point was undisputed and consented that it be read, but, after the court had ordered it read, asked to have all the other evidence read, and on refusal thereof by the court objected to the reading of the testimony first mentioned. *Held*, that it was not error to permit the reading of such testimony, counsel for defendant having himself invited it. *Markley v. State*, 137

CROSS-COMPLAINT. See PLEADING, 6.

CROSS-EXAMINATION. See CONTRACTS, 1. EVIDENCE, 8. MASTER AND SERVANT, 14. WITNESSES, 1, 2, 5.

CROSSINGS. See RAILROADS, 2–24.

DAMAGES.

Nominal damages. See DAMAGES, 8.

Grounds and subjects of compensatory damages. See ATTACHMENT. CONTRACTS, 3–11. EMINENT DOMAIN, 5. HUSBAND AND WIFE, 4, 5. INSURANCE, 1, 2. RAILROADS, 7.

Same: Direct or remote. See DAMAGES, 4, 6, 16, 17.

1. The legal damages for breach of contract are such as may fairly and reasonably be considered to be the natural and proximate result of the breach and, in the light of the circumstances known, actually or constructively, to both parties at the time of such making, as having been then in their mutual contemplation as the probable result of such breach. *Malueg v. Hatten L. Co.* 381

2. Damages recoverable for breach of contract must be reasonably certain and the proximate result of the breach, excluding all merely speculative or imaginary damages. *Richey v. Union Central L. Ins. Co.* 486

3. Although the elements of future damages for breach of contract may be involved in some uncertainty and contingency, yet if, from the facts shown, it can be inferred with reasonable certainty that the breach caused the other party pecuniary loss, compensation therefor should be recovered even though future profits may be involved in its ascertainment. *Ibid.*

Same: Speculative. See DAMAGES, 2.

4. Damages for loss of profits from a prospective contract of employment which was not secured because of defendant's negligent failure to deliver a telegram apprising plaintiff of the opportunity to close such contract, are not too speculative to be recovered. *Stumm v. W. U. Tel. Co.* 528

Exemplary or punitory damages. See HUSBAND AND WIFE, 4, 5.

5. Punitory damages are not assessable as matter of right, and the question of their allowance or disallowance is one for trial courts and juries to pass upon. The supreme court will not reverse a judgment for failure to award such damages, nor will it undertake to make an assessment thereof. *Tilton v. J. L. Gates L. Co.* 197

Measure of damages. See APPEAL, 18. ATTACHMENT. EMINENT DOMAIN, 5. HIGHWAYS, 17.

6. In an action for damages for wrongful conduct preventing plaintiff from obtaining employment the reasonable value the contract would have netted to him had the breach of duty not occurred is

the measure of damages, provided the evidence presents a fair basis for determining such value with reasonable certainty. *Stumm v. W. U. Tel. Co.* 528

7. If a breach of contract consists of failure to deliver, upon a sale agreement, personal property at a specified time, there being no special circumstances, known to both parties at the time of making the agreement, varying the general rule, the damage recoverable is the difference, at the time of the breach and at the agreed place of delivery, between the market value of the property and the contract price, with legal interest from the time of the breach. *Malueg v. Hatten L. Co.* 381

8. In case of an action for damages for breach of contract, in the circumstances mentioned in No. 7, in the absence of evidence that the market value of the property at the time and place of delivery agreed upon, exceeded the contract price, no more than nominal damages are recoverable. *Ibid.*

9. In case of partial delivery of property, in the circumstances mentioned in No. 7, and payment therefor after the breach without objection and with knowledge of the facts, the agreement providing for payment as fast as deliveries are made, such circumstances do not, of themselves, waive any claim for damages for such breach. *Ibid.*

10. In case of the breach of contract in the circumstances stated in the foregoing, and a claim thereafter upon the side of the executory vendee that he is legally entitled upon the contract to the balance of the property, and insistence upon the other that he is under no such obligation, and delivery of the balance of the property pursuant to a mutual understanding for payment therefor at the market price at the time of delivery, in case of the vendee not being entitled as he claims, the vendor should be paid such market price. *Ibid.*

Excessive damages. See HUSBAND AND WIFE, 5.

11. A verdict of $10,000 for damages sustained by a child ten years of age, consisting of loss of his left arm close to the shoulder, a cut on his head, and bruises and scratches on his face, which was held not excessive by the trial court, will not be disturbed on appeal. *Schwind v. C., M. & St. P. R. Co.* 1

12. A man forty-three years old, earning $2.75 per day, sustained injuries necessitating amputation of his left arm close to the shoulder; his nose was broken and his face disfigured; three ribs were fractured, and his side badly lacerated and perhaps permanently injured. *Held*, that a verdict awarding $14,500 damages, upheld by the trial court, should not be disturbed on appeal. *Monaghan v. N. W. Fuel Co.* 457

13. MARSHALL, J., is of the opinion that under sec. 2878, Stats. (1898), where damages awarded are so excessive as to show passion or prejudice on the part of the jury the verdict may be set aside as being "contrary to the evidence;" and that it may be set aside "for excessive or inadequate damages" although there was no passion, prejudice, or improper motive. *Ibid.*

14. An award of $5,200, reduced from $6,200 to that figure by the trial court, is *held* not excessive for serious and painful injuries to a laboring man forty-three years old, resulting in the loss of one of his eyes and impaired vision in the other. *Nelson v. A. H. Stange Co.* 657

15. Where damages awarded by the jury have been reduced by the trial court, the supreme court is reluctant to interfere further with the verdict on the ground that the amount is still excessive. *Ibid.*

Evidence.

16. Evidence, stated in the opinion, is *held* to show resulting damages with reasonable certainty and justify recovery thereof. *Richey v. Union Central L. Ins. Co.* 486

For breach of contract of employment.

17. In an action for the breach of the contract by the insurance company, whereby the agency business which plaintiff had built up was destroyed, the damages recoverable are not subject to be reduced by the amount which he earned in other employment after the breach and before trial. *Ibid.*

DAMS. See CONSTITUTIONAL LAW, 7–9. CORPORATIONS, 2–4. EMINENT DOMAIN, 2. MILLS AND MILLDAMS. NAVIGABLE WATERS, 1, 3.

DEATH.

See APPEAL, 16. INSURANCE, 3. MASTER AND SERVANT, 16, 25, 26, 28. STREET RAILWAYS, 3.

Proof of diligent search and inquiry is not required to establish the presumption of death of a person who has been absent from his home or place of residence for seven years without being heard from. *Miller v. Sovereign Camp,* 505

DEBTOR AND CREDITOR. See ATTACHMENT. BANKRUPTCY. BANKS AND BANKING, 1, 2. CONTRACTS. CORPORATIONS, 5–8. PENSIONS.

DECEIT. See VENDOR AND PURCHASER, 8.

DECLARATIONS. See EVIDENCE, 3–5. HIGHWAYS, 9. HUSBAND AND WIFE, 2. INDIANS, 4.

DEEDS.

Requisites and validity. See CANCELLATION OF INSTRUMENTS.

Same: Delivery by agent: Apparent authority.

1. A person intrusted with a deed for the purpose of obtaining the signatures of the grantors and making delivery for them, was clothed at least with apparent authority to close the deal on their part; and where, on his presenting the deed to the grantee, the latter objected to the date specified therein as the expiration of the time within which a corporation must remove from the land certain standing timber which the grantor had conveyed to it, and the agent thereupon changed such date to correspond with that specified in the conveyance to the corporation, the grantee had a right to rely upon the agent's apparent authority and to accept the deed as thus changed, and the grantors were bound thereby. *Bretz v. R. Connor Co.* 269

Construction: Property conveyed.

2. In a conveyance of land, a clause "reserving the pine and cedar timber now growing or being thereon and the right to cut and remove the same" is an exception, not a reservation. The timber remains the property of the grantor, together with a right in so much of the soil as is necessary to sustain it, and he is not bound to remove it within a reasonable time. *Bardon v. O'Brien,* 191

3. Under a deed conveying timber standing or situated on certain lands, "with the right to the" grantee "to enter upon said lands and remove said timber . . . at any time on or before" a certain date, only such timber passes as is removed during the time specified. *Bretz v. R. Connor Co.* 269

DELEGATION OF LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 1–4. COURTS, 8, 9. EMINENT DOMAIN, 1, 2. RAILROADS, 8, 20.

DELIVERY. See DAMAGES, 7, 9, 10. DEEDS, 1.

DEMAND. See EMBEZZLEMENT, 2.

DEMURRER. See APPEAL, 20. MUNICIPAL CORPORATIONS, 20. PLEADING, 5, 6.

DEPOSITS. See BANKS AND BANKING, 1, 2.

DEPOT GROUNDS. See RAILROADS, 25.

DESCENT AND DISTRIBUTION.

See HOMESTEAD.

If a parent leaves, by will, property to one of several children, with no disposition over in the event of the termination of that estate, and such child dies under age, not having been married, such property, though testate as regards the parent, is intestate as regards the child, and descends to the other children of the testator, living at the death of the child, and to the issue of such as are dead, by right of representation, under subd. 5, sec. 2270, Stats. (1898). *Bowker v. Shields,* 330

DIRECTORY STATUTES. See STATUTES, 2.

DISCHARGE. See MASTER AND SERVANT, 4.

DISCRETION. See CRIMINAL LAW, 25. COSTS, 1. COURTS, 4. INDICTMENT AND INFORMATION, 2. MANDAMUS. MUNICIPAL CORPORATIONS, 1, 9, 11–14. OFFICERS, 5–7. WITNESSES, 1.

DISMISSAL.
Of action. See EJECTMENT, 7.
Of appeal. See APPEAL, 22.

DISSOLUTION. See CORPORATIONS, 5–8.

DIVORCE.

In an action for divorce a finding that defendant wilfully deserted plaintiff for the statutory period is *held* not so clearly against the preponderance of the evidence as to warrant reversal of the judgment. *Karnes v. Karnes,* 280

DOCUMENTARY EVIDENCE. See EVIDENCE, 4, 6, 7.

DOMICILE.

Upon evidence that a son resided with his widowed mother until his majority and thereafter returned to her home frequently and made it his headquarters, and in the absence of any evidence that he acquired or intended to acquire a different home or place of residence, the trial court properly assumed that his residence was with his mother. *Miller v. Sovereign Camp,* 505

DOWER.

Nature and requisites. See EJECTMENT, 8.

1. By "seisin" as the term is used in sec. 2159, Stats. (1898), relating to dower, is meant a fixed vested right of enjoyment of the estate, either immediately or at the termination of an intermediate estate. *Will of Prasser*, 92
2. Sec. 2159, Stats. (1898), gives dower out of legal estates only, as was the case at common law. *Ibid.*
3. A devisee who, under the will, took a vested remainder in fee in land of the testator, subject only to a life estate and to a subsequent trust limited to ten years, and who died after the life estate had ended, was during his life "seised of an estate of inheritance" within the meaning of sec. 2159, Stats. (1898), and such estate being a legal estate as against all persons except the trustees, whose term was for years only, his widow was entitled to dower. *Ibid.*
4. A full equitable title to real estate and like beneficial interest therein, the holder of the legal title having no duty to perform in respect to the property except to convey the legal title to the owner of the equitable title, is an estate of inheritance within the meaning of the dower statute. *Harley v. Harley*, 282

Assignment of dower.

5. If a widow with her children is left by the death of her husband in possession of land in which she has a dower right she may at law maintain that position without having her dower assigned. *Ibid.*
6. A widow's dower in land will enable her not only to defend her possession if left therein with her children by her husband at his decease, without having such dower assigned, but whether she has issue by such husband or not she may maintain ejectment to obtain such dower. *Ibid.*

DRAINS.

Establishment: Draining navigable lake.

1. Sec. 1379—28, Stats. (Laws of 1907, ch. 646), authorizing drainage commissioners to condemn "riparian rights, rights of flowage and water power," does not authorize the destruction of bodies of water navigable in fact. *Johnson v. Eimerman*, 327

Maintenance and repairs.

2. The petition for a writ of *mandamus* to compel drainage commissioners to repair a ditch did not show that they had money available for that purpose, and did show that money was obtainable therefor only by filing an annual report, securing judicial approval, and collecting assessments as provided in ch. 419, Laws of 1905, and that no such report had been made although it was the duty of the commissioners to make it. *Held*, that the writ would not issue to compel the making of the repairs. *State ex rel. Redenius v. Waggenson*, 265

DUE PROCESS OF LAW. See SUNDAY LAWS, 2.

EASEMENTS. See EJECTMENT, 1. MILLS AND MILLDAMS.

EJECTMENT.

Right of action.

1. Where the owner in fee has been wrongfully deprived of the possession of land he may maintain ejectment to recover that pos-

session, and it is immaterial whether such deprivation has been caused by the exercise of an easement which wrongfully excluded him from possession, or otherwise. *Le Blond v. Peshtigo*, 604

2. Where land has been wrongfully taken for a highway, and the only right which the owner may exercise over it is the right to use it as a highway in common with all others, he has been deprived of his possession. *Ibid.*

Defenses.

3. One cannot recover in ejectment unless he is entitled to possession at the time he commences his action. *Harley v. Harley*, 282

4. A legal defense in ejectment is not pleadable as a counterclaim, since otherwise by the forms of pleadings a defense raising issues as matter of right commonly understood to be triable by a jury could be so interposed as to require trial by the court. *Ibid.*

5. If a person on a sufficient consideration agrees to convey real estate to another as his property and puts such other into possession pursuant thereto, who subsequently, while in such possession, dies intestate, leaving a widow and children, the circumstances being such that such person could have been judicially compelled to convey the land, pursuant to the agreement, to the executory vendee had he lived and such person nevertheless brings ejectment against the widow who is in possession with her children, such facts are a good legal defense, and are pleadable as an equitable defense as well to secure appropriate relief. *Ibid.*

6. In the situation above stated the defendant may have the benefit of the equitable defense and obtain such affirmative relief as to fully protect her notwithstanding her children are not made defendants, unless their presence in the litigation is necessary for their due protection or in order that a full determination of all the issues may be had. *Ibid.*

7. In the contingency suggested the court should not dismiss the action nor render judgment in plaintiff's favor, but should, on his own motion, order the necessary parties brought in unless some one presently a party so moves. *Ibid.*

8. In the situation stated in number 6 the widow for her life or widowhood is the equitable owner of the homestead, if there be one, with the right to be clothed with the legal title to that extent, and the owner of a dower right in the other lands, if there be such, with the right to be clothed with such title as will fully protect such dower right. *Ibid.*

ELECTION between counts or causes of action. See BANKS AND BANKING, 3. INDICTMENT AND INFORMATION, 2. PLEADING, 2.

ELECTIONS. See CONSTITUTIONAL LAW, 1, 2.

EMBEZZLEMENT.

See CRIMINAL LAW, 26.

1. There is no material variance between an information charging embezzlement of sixty dollars in money and proof that defendant received a check for a larger sum in payment of sixty dollars upon a debt to a corporation of which he was president;

that he paid the difference to the debtor and deposited the check in a bank in his own name; and that he afterwards drew the money from the bank. *Prinslow v. State*, 131

2. Proof of a demand for money alleged to have been embezzled is necessary only where a demand is necessary to show the fraudulent conversion embraced in the offense. *Ibid.*

EMINENT DOMAIN.

Delegation of power. See CONSTITUTIONAL LAW, 8, 9. DRAINS, 1. RAILROADS, 2–21. STREET RAILWAYS, 1, 2.

Same: Public purpose.

1. Whether the particular use for which property is sought to be taken by right of eminent domain is public or private is a question the ultimate decision of which rests with the courts; but this does not preclude the courts from according proper deference to legislative declarations as to what constitutes a public purpose. *In re Southern Wis. Power Co.* 245

2. Where the legislature authorizes the building of a dam across a river to improve the navigation thereof and also for the purpose of creating hydraulic power, either of such purposes is a public one, so that the power of eminent domain may be legally conferred upon the owners of the franchise. *Ibid.*

Proceedings to take property and assess compensation. See RAILROADS, 2–23.

3. An alleged irregularity in condemnation proceedings, in that no order appears of record directing the clerk to enter judgment, will not, where no substantial rights of the appellant are affected thereby, work a reversal of the judgment. *Wolf v. G. B., O., M. & S. W. R. Co.* 337

4. The fact that the rights of a mortgagee were not adjudicated in condemnation proceedings is not good ground for disturbing the judgment on appeal, where the parties had stipulated that the mortgage claim should be paid out of the amount recovered. *Ibid.*

5. In proceedings to condemn a strip of land for a railroad the proper inquiry with reference to damages recoverable for injury to plaintiff's adjoining lands, was whether such lands were depreciated in market value by the taking of the strip for that purpose; but it was not prejudicial error in this case to permit witnesses to be asked what in their opinion was the amount of damage caused by the railroad cutting through plaintiff's land, it appearing that counsel, court, and jury all understood that the word "damage" referred to depreciation in the market value of the part of plaintiff's land not taken. *Ibid.*

6. In condemnation proceedings witnesses who showed familiarity with the value of lands and the probable injury to such lands from division thereof by a railroad and its operation were qualified to give opinion evidence on the subject. *Ibid.*

Remedies of owner of property. See STREET RAILWAYS, 1, 2. VENDOR AND PURCHASER, 6.

ENTIRE CONTRACTS. See CONTRACTS, 6, 7. MASTER AND SERVANT, 6.

EQUAL PROTECTION OF LAW. See SUNDAY LAWS, 2.

EQUITY.
Jurisdiction. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 15, 16. CORPORATIONS, 5–8. INJUNCTION. MILLS AND MILLDAMS, 3. SUNDAY LAWS, 5. VENDOR AND PURCHASER, 4–6.
Costs. See COSTS, 1.
ESTATES. See WILLS, 3–10.
ESTOPPEL. See BANKS AND BANKING, 2. INSURANCE, 4. WAIVER, 1.

EVIDENCE.

Presumptions. See DEATH. DOMICILE. HIGHWAYS, 6, 7. INSURANCE, 10. OFFICERS, 8. SCHOOLS AND SCHOOL DISTRICTS, 4.

1. Where mere circumstances are reasonably consistent with a theory of violation of a penal statute and also inconsistent therewith, the latter should prevail in the absence of corroborating evidence. *McNaughton v. Des Moines L. Ins. Co.* 214

2. Although a man had recently come to this country and did not speak English it will be presumed that he was a man of ordinary intelligence. *Fosnes v. Duluth St. R. Co.* 455

Burden of proof. See INSURANCE, 8. MASTER AND SERVANT, 27.

Best evidence. See INDIANS, 4.

Circumstantial evidence. See CRIMINAL LAW, 4–7, 12, 22. HOMICIDE, 2. JURORS.

Admissions: By agents.

3. Unsworn statements or admissions of an agent are not evidence in favor of the principal. *T. D. Kellogg L. & M. Co. v. Webster M. Co.* 341

4. In an action by a grantee of land upon a covenant against incumbrances to recover a sum paid in redemption of a tax certificate, declarations in a letter written by an agent of defendant, found in his files, stating that another agent had bought in the certificate in his own name and that defendant had made a draft to make up the amount thereof, were mere self-serving declarations and not admissible on behalf of defendant to show that the certificate was taken by the agent for defendant and that the transaction amounted to a payment of the taxes. *Ibid.*

5. Admissions of the agent who took the tax certificate in his own name, that he took it for defendant, are not admissible against plaintiff under the doctrine that the admissions of an assignor, made prior to the assignment, are admissible against the assignee. Plaintiff having redeemed from the tax sale and having sued for breach of the covenant against incumbrances, is not claiming as assignee of the agent. *Ibid.*

Declarations. See EVIDENCE, 3–5. HUSBAND AND WIFE, 2. INDIANS, 4.

Documentary evidence: Ancient documents. See HIGHWAYS, 6.

Same: Account books.

6. Entries in account books are not, under sec. 4187, Stats. (1898), admissible as evidence of any item of money paid at one time exceeding five dollars. *T. D. Kellogg L. & M. Co. v. Webster M. Co.* 341

Same: Letters.

7. A letter on one of the regular letterheads used by the alleged writers, which the addressee testified was received directly from

them, was properly admitted in evidence though marked "copy" and signed with a stamp instead of in writing. *Stumm v. W. U. Tel. Co.* 528

Opinion evidence: Subjects of expert testimony. See EMINENT DOMAIN, 5.

Same: Competency and examination of experts. See EMINENT DOMAIN, 6. HIGHWAYS, 15.

8. In the trial of a case involving the examination of long book accounts it is proper for expert accountants to give in evidence, in summary form, the results of their examination of the books, time and opportunity being granted to the opposite party to use the books to test the correctness of such evidence and for the purpose of cross-examination. *Ruth v. State,* 373

9. The opinion of a physician as to the physical condition of plaintiff, the necessity of an operation, and its effect, based on plaintiff's testimony as to his condition and upon an examination made by the witness after the injury, was competent, its weight being for the jury. *Monaghan v. N. W. Fuel Co.* 457

10. In an action for personal injuries, a question to an expert witness as to how the injury affected the plaintiff was proper, the word "injury" being used to designate the contusion, bruise, or trauma in question, and not the invasion of legal rights which might have occurred at the time of the accident. *Dralle v. Reedsburg,* 319

11. An objection to a long hypothetical question on the ground that it does not contain all the elements of fact testified to will be considered on appeal only so far as it specifies the facts claimed to be omitted. *Ibid.*

12. In a hypothetical question as to whether the injury sustained by plaintiff was a sufficient producing cause of her physical condition as found by the witness, it was not necessary to include the fact that plaintiff had given birth to seven children, all of whom died in infancy or shortly thereafter. *Ibid.*

Weight and sufficiency. See BANKS AND BANKING, 1, 2, 4. CONSPIRACY. CONTRACTS, 1, 2. CRIMINAL LAW, 2, 3, 10, 11. DIVORCE. DOMICILE. EVIDENCE, 9. HIGHWAYS, 11. INDIANS, 4. INSURANCE, 6. INTOXICATING LIQUORS. MASTER AND SERVANT, 26. NAVIGABLE WATERS, 1. NEW TRIAL, 1. RAPE. SALES, 6. STREET RAILWAYS, 3. SUBSCRIPTIONS, 3. TAX TITLES, 1, 4, 5. VENDOR AND PURCHASER, 7. WILLS, 1, 2.

13. It requires an extraordinary case to authorize the court to treat sworn testimony as manifestly impossible and untrue. *Bates v. C., M. & St. P. R. Co.* 235

EXCEPTIONS. See APPEAL, 1-4, 10. DEEDS, 2. INDICTMENT AND INFORMATION, 1.

EXCEPTIONS, BILL OF.

See APPEAL, 2, 8. COSTS, 4.

After the time for appeal from an order or judgment has expired the court should not, in the absence of stipulation of the parties, settle a bill of exceptions covering the proceedings which led up only to the making of such order or the rendition of such a judgment. *Nelson v. A. H. Stange Co.* 657

EXCESSIVE DAMAGES. See DAMAGES, 11–15. HUSBAND AND WIFE, 5.

EXECUTORS AND ADMINISTRATORS. See DESCENT AND DISTRIBUTION. INDIANS. WILLS.

EXECUTORY CONTRACTS. See CONTRACTS, 3–11. DAMAGES, 7–10.

EXEMPLARY DAMAGES. See DAMAGES, 5. HUSBAND AND WIFE, 4, 5.

EXEMPTIONS. See PENSIONS. TAXATION, 1–3.

EXPERT TESTIMONY. See EMINENT DOMAIN, 5, 6. EVIDENCE, 8–12. HIGHWAYS, 15.

EXTRADITION.

One who has been brought into this state by extradition proceedings based on a criminal charge is not subject to arrest in contempt proceedings to enforce compliance with a prior civil judgment against him, until he has had an opportunity to return to the state from which he was extradited, even though he was, when he absconded, a resident of this state and had not since acquired a residence elsewhere, and the court in which said judgment was rendered had, before his departure, obtained jurisdiction both of the subject matter of the action and of his person. *State ex rel. Hattabaugh v. Boynton*, 89

FALSE REPRESENTATIONS. See CANCELLATION OF INSTRUMENTS. CONTRACTS, 14. INSURANCE, 4. VENDOR AND PURCHASER, 8.

FENCES. See RAILROADS, 25–31.

FINDINGS OF FACT. See APPEAL, 6, 11–17, 28. DIVORCE. MILLS AND MILLDAMS, 5, 6. NAVIGABLE WATERS.

FIRES. See INSURANCE, 1, 2.

FOOD.

See MUNICIPAL CORPORATIONS, 7.

1. In a prosecution under sec. 4607, Stats. (Supp. 1906; Laws of 1905, ch. 138), for having in possession adulterated milk with intent to sell it, the state need not allege or prove that it was not to be sold as and for "skimmed milk," within the exception stated in sec. 4607*a*. *Splinter v. State*, 567

2. Having in possession seventeen cans of milk with intent to sell the same, in six of which cans the milk contained less than the prescribed percentage of milk fat, was a violation of the statute, although the average of the entire lot was above the legal standard. *Ibid.*

FRANCHISES. See CONSTITUTIONAL LAW, 10, 11. CORPORATIONS, 2–4. EMINENT DOMAIN, 2. NAVIGABLE WATERS. STREET RAILWAYS, 1.

FRAUD.

See CANCELLATION OF INSTRUMENTS. PLEDGE.

1. One who makes representations to another of material facts for the purpose of inducing that other to enter into contractual relations with him and which are liable to accomplish the purpose without want of ordinary care on the part of such other, is bound, not merely not to act negligently, but at his peril to know whereof he speaks. *Kathan v. Comstock*, 427

2. One not himself knowing the facts involved may reasonably act on representations by another who desires to enter into contractual relations with him, as to conditions not presently observable. *Ibid.*

FRIVOLOUS PLEADING. See PLEADING, 4.

FUTURE DAMAGES. See DAMAGES, 3, 4, 6.

GENERAL CITY CHARTER. See SCHOOLS, 1, 2.

GIFTS. See WILLS, 5, 6.

GOOD FAITH. See MUNICIPAL CORPORATIONS, 13.

GUARDIAN AND WARD. See INSANE PERSONS.

HABEAS CORPUS.

In a proceeding by *habeas corpus* to procure the discharge of one held for trial after a preliminary examination, the court can only examine the evidence sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. *Lundstrum v. State*, 141

HEALTH.

See FOOD. MUNICIPAL CORPORATIONS, 7.

1. Health officers who are expected to accomplish results must necessarily possess large powers and be endowed with the right to take summary action, which at times trenches closely upon despotic rule. *State ex rel. Nowotny v. Milwaukee*, 38
2. Executive boards and officers who can deal at once with emergencies under general principles laid down by the lawmaking body must exist if the public health is to be preserved. *Ibid.*

HEIRS. See INDIANS. INSANE PERSONS.

HIGHWAYS.

Definition: "Public highway."

1. The term "public highway," in the broad ordinary sense, includes every common way for travel by persons on foot or with vehicles rightfully used on highways, which the public have the right to use either conditionally or unconditionally. *Weirich v. State*, 98
2. The term "public highway" in a limited sense means a way for general travel, which is wholly public. *Ibid.*
3. In the general sense the term "public highways" includes toll roads; in its limited sense it does not. *Ibid.*
4. The term "public highway" in a general law should be regarded as having been used by the legislature in its general sense unless there is some efficient reason for believing it was used in the limited sense. *Ibid.*
5. A general law, regulating the operating of automobiles upon public highways in the interest of public safety, rather suggests use of the term "public highway" in the general than the particular sense, since the danger of personal injury is quite as great and immunity therefrom is quite as important as to travelers on the one as the other. *Ibid.*

Establishment by statutory proceedings: Presumptions: Width: Line of travel. See EJECTMENT, 2.

6. A petition to the road commissioners in 1847 for the laying out of a highway was recorded in the town records, as was also a survey headed "Survey of a public road for the town of O.," definitely describing the line of the road throughout, and signed by the surveyor and the commissioners. These were the only records as to the highway, but the road was opened and traveled, at least partially, upon the line described. *Held* that, in view of the lapse of time, the survey must be regarded as an ancient document; and all proceedings leading up to the making of such survey will be presumed to have been regularly taken pursuant to Laws of 1843, p. 46, §§ 1, 2. It will be presumed, therefore, that the petitioners were freeholders residing in the town, although the petition does not show that fact, and that an order laying out the road had been regularly made. *Olwell v. Travis*, 547

7. The established width of public highways at the time in question and since having been four rods, the road will be deemed to have been laid out of that width, with the line described in the survey as its center. *Ibid.*

8. The fact that at a certain point a highway was traveled on one side only of the center line thereof as shown by the survey, did not operate to change the limits of the road as laid out. *Ibid.*

9. Slight deviation of travel from a highway as laid out, and the maintenance of fences at irregular distances from the center line, though continued for more than twenty years, did not result in abandonment of any part of the highway or in the acquirement of title by user to any land outside of its limits, where there had never been any attempt to have the fences placed on the true line, but mere passive acquiescence in their remaining where placed, and no dedication of land for the highway outside of its limits as laid out. *Ibid.*

Regulation of use and travel. See AUTOMOBILES.

Same: Railroad crossings. See RAILROADS, 22–24.

Same: Obstructions: Personal injuries.

10. Town authorities have the right to deposit material in the highway at convenient and proper places for the purpose of repairing the same, in the exercise of ordinary care; but they have no right to so place such material as to render the highway dangerous to travelers, and permit it to remain an unreasonable time. *Berg v. Auburn*, 492

11. Findings in a special verdict to the effect that an iron pipe two and a half feet in diameter, twelve feet long, painted red, which the defendant town had placed about eight feet from the traveled track and permitted to remain there for eleven days, was an object likely to frighten horses of ordinary gentleness, and that defendant was negligent in allowing it to remain where it did, are *held* to be sustained by the evidence. *Ibid.*

12. The findings above mentioned, together with findings that defendant's negligence was the proximate cause of plaintiff's injury, that plaintiff was not guilty of contributory negligence, and assessing his damages, are *held* sufficiently to have covered the material controverted issues, especially in the absence of any request for the submission of other questions. *Ibid.*

Same: Notice of injury.

13. In an action for injuries caused by defect in a highway the complaint, notice, and claim should be construed together as a pleading, and so construed the allegations, stated in the opinion, are *held* sufficient to permit the admission of evidence of injuries to plaintiff's side, back, and ribs, and also of an atrophy or wasting of the muscles of the back, causing curvature of the spine and having a tendency to increase. *Dralle v. Reedsburg*, 319

14. The notice required by sec. 1339, Stats. (1898), need not specify the particulars in which the party is injured nor contain any description of the injuries. *Ibid.*

Same: Reception of evidence.

15. It was not error to exclude the opinion of a witness as to whether it would have been possible or practicable for plaintiff to drive over a part of the highway lying outside of the traveled track at the place of the accident, in the absence of evidence that plaintiff had an opportunity to leave the traveled track and had such knowledge of the defect therein as would require a person exercising ordinary care to leave the track and drive outside thereof. *Ibid.*

Same: Instructions to jury.

16. An instruction that, in determining whether or not the highway was defective at the place in question, the jury should consider the amount of labor and money which must be expended to obviate the alleged defect, and whether such expense would be so excessive as to render the change impossible or impracticable, is *held* (whether correct in law or not) to have been properly refused as inapplicable to the facts in this case. *Dralle v. Reedsburg*, 319

17. Refusal to instruct the jury that plaintiff was not entitled to recover for loss of her time was not error in this case, in view of other instructions given and of the fact that no claim for such recovery was made and no evidence offered on the subject. *Ibid.*

[18. Whether, under sec. 1339, Stats. (1898), as amended by ch. 305, Laws of 1899, providing that a husband shall have no right of action on account of injuries received by his wife by reason of a defect in a highway, a wife may recover damages for loss of her time, not determined.] *Ibid.*

HIGHWAY CROSSINGS. See RAILROADS, 22-24.

HOMESTEAD.

See EJECTMENT, 8.

The homestead right which descends as such on the death of a husband leaving a widow and children, attaches to the home property even though the husband had only the full equitable title thereto. *Harley v. Harley*, 282

HOMICIDE.

Evidence: Admissibility. See CRIMINAL LAW, 3.

1. The rejection of evidence offered to prove that a person other than the accused committed the particular homicide in question is not harmful error, where it is manifest from the whole

evidence that such person was in no way connected with the offense, in that he was not in the vicinity of the place thereof at the time of the occurrence. *Spick v. State*, 104

2. In a prosecution for a criminal homicide dependent upon circumstantial evidence, as bearing on the question of motive of the accused for doing the deed of which he is accused, it is competent to show that prior to the homicide the deceased reported that the accused had, to his knowledge, committed another offense, in the absence of any direct evidence that the accused knew who was the informant, if, from all the circumstances, it is reasonably inferable that he did know in fact, or had good reason to believe and did believe, the deceased to be his accuser; consideration of such evidence to be dependent upon belief of the jury that the defendant did, in fact, know or believe before the homicide that the deceased was the informer. *Ibid.*

3. DODGE, J., and WINSLOW, C. J., *dissenting*, are of the opinion that it was prejudicial error in this case to admit evidence that the deceased had reported to a third person that the accused had committed another offense,—such evidence being pure hearsay and there being no other evidence that the accused had committed such other offense and no evidence warranting an inference that he knew or suspected that the deceased had given such information. *Ibid.*

Trial: Verdict.

4. In case of a criminal homicide manifestly committed by an act imminently dangerous to human life, and indicative of depravity of mind and disregard of human life, so characterized as to show the grade of the offense to be murder in the first or second degree, any circumstance sufficient, reasonably, to at least cause reasonable doubt as to whether the act was pursuant to a formed design to take human life, warrants finding a verdict of guilty of murder in the second degree. *Ibid.*

5. In case of belief from the evidence beyond a reasonable doubt that the accused is guilty of the offense of criminal homicide in either the first or second degree, but there is reasonable uncertainty between the two degrees, though belief of guilt of the offense at least in the second degree, a verdict of guilty in such degree is proper. *Ibid.*

HUSBAND AND WIFE.

Torts: Personal injuries to wife. See HIGHWAYS, 18.

Enticing and alienating: Parties: Evidence: Damages.

1. In an action by a wife for alienation of her husband's affections the husband is not a proper party defendant, since he was not a joint tortfeasor with those who wrongfully brought about his state of mind, and cannot be held to have joined or confederated with the active parties in the wrong constituting the cause of action. *White v. White*, 538

2. In such action the plaintiff may testify to declarations by her husband as to offers made to him by defendants to induce him to abandon her. *Ibid.*

3. In determining whether parents maliciously conspired to alienate their son's affections from his wife, the evidence should be considered in view of the rights of the parents and their obligations respecting their child's welfare and happiness. *Ibid.*

4. In an action by a wife for a malicious conspiracy to alienate the affections of her husband, punitory damages may be awarded, even though one defendant is without property and the other is wealthy. *Ibid.*

5. In an action by a wife for alienation of her husband's affections an award of $5,000 compensatory damages and $1,500 punitory damages is *held* not excessive. *Ibid.*

HYPOTHETICAL QUESTIONS. See EVIDENCE, 11, 12.

ILLEGITIMATE CHILDREN. See INDIANS, 3, 4.

IMPEACHMENT of witnesses. See CRIMINAL LAW, 15, 16.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 17–27.

INCOMPETENT PERSONS. See INSANE PERSONS. WILLS, 1.

INDIANS.

1. In proceedings for administration of the estate of an Indian allottee of lands, the title to which was held in trust by the federal government, there being other property warranting the administration, the parties by stipulation submitted to the county court the question whether a certain person was the son and sole heir at law of the deceased. *Held*, sufficient to give the court jurisdiction. *Smith v. Smith*, 599

2. The order or judgment of the court in such a case does not transfer the title or disturb the possession of the allotted lands; and the United States, as trustee, may recognize or refuse to recognize it as evidence, conclusive or *prima facie*, of heirship. *Ibid.*

3. Under a federal statute (26 U. S. Stats. at Large, 794, ch. 383) making illegitimate children lawful heirs of their Indian father, paternity is to be established by a preponderance of evidence, and need not be established beyond reasonable doubt nor by evidence clear and convincing beyond reasonable controversy. *Ibid.*

4. In such a case declarations of the deceased mother and of the alleged deceased father respecting the paternity of an illegitimate are competent, and when they are the best evidence the nature of the case will admit of, and are not overcome by other more convincing evidence, they are sufficient. *Ibid.*

5. The construction given to the federal statute (26 U. S. Stats. at Large, 794, ch. 383) in *In re Heirs of House*, 132 Wis. 212, is adhered to. *Ibid.*

INDICTMENT AND INFORMATION.

Formal requisites. See SUNDAY LAWS, 3, 5.

Election between counts. See BANKS AND BANKING, 3.

Requisites and sufficiency. See CRIMINAL LAW, 19.

1. Where an exception is stated in a separate section of the statute and constitutes no essential part of the definition or description of an offense, it need not be negatived by the prosecution, but is a matter of defense. *Splinter v. State*, 567

2. The matter of requiring prosecuting officers in criminal cases to elect on what count of an information they will prosecute the cause is very much in the discretion of the trial court. *Ruth v. State*, 373

Variance. See EMBEZZLEMENT, 1. FOOD, 1.

INJUNCTION.

See APPEAL, 5. MUNICIPAL CORPORATIONS, 20–22. PLEADING, 6. SUNDAY LAWS, 5.

1. The facts stated in the opinion did not entitle plaintiff to the interference of equity to prevent either irreparable injury or a multiplicity of actions at law. *Le Blond v. Peshtigo*, 604
2. The averment that plaintiff has been permanently deprived of the use and enjoyment of the strip of land in question is construed as equivalent to a statement that she has been deprived of the possession of said strip; and it appearing that what she seeks to recover is the possession of the land, not of a mere easement over it, she has an adequate remedy at law in an action of ejectment. *Ibid.*

INSANE PERSONS.

Inquisitions. See CONSPIRACY.

Mental capacity. See WILLS, 1.

Guardianship: Refusal of appointment: Right of appeal.

1. Under sec. 3976, Stats. (1898), any relative or friend of a person alleged to be mentally incompetent may institute a proceeding in the county court for appointment of a guardian, but under sec. 4031, besides certain specified official persons, only a "person aggrieved" by the determination of the court can appeal therefrom. *Sanborn v. Carpenter*, 572
2. No person is "aggrieved," within the meaning of said sec. 4031, unless the determination affects adversely his legal rights; mere affront to desire or sentimental interest being insufficient. *Ibid.*
3. Next of kin or heirs apparent have no legal rights or interest in the property of a living relative. *Ibid.*
4. Refusal to appoint, upon the petition of nonresident adult sister, a guardian for an alleged incompetent adult residing in this state, did not affect any legal rights of the petitioner, she having no legal right to control the custody or conduct of the alleged incompetent, no legal right to support from, or legal duty of care or support to, the latter, and no legal rights in or to the property of the latter. *Ibid.*

INSTRUCTIONS TO JURY.

1. Requested instructions refused are not reviewed in the absence of exceptions to such ruling. *Monaghan v. N. W. Fuel Co.* 457
2. No error can be assigned on instructions relative to a question determined in appellant's favor. *Lehman v. C., St. P., M. & O. R. Co.* 497
3. A proper instruction, where conviction depends partly or wholly on circumstantial evidence, is: The accused is entitled to an acquittal unless the evidence satisfies the jury to a moral certainty of the existence of all the material circumstances; that they are consistent with guilt and inconsistent with any other reasonable hypothesis. *Spick v. State*. 104
4. On the degree of certainty of guilt required for a conviction it is sufficient to instruct the jury: In order to warrant a conviction

each and all of the material circumstances and the fact of guilt should be established to the satisfaction of the jury beyond a reasonable doubt. *Ibid.*

5. A jury may be instructed that the evidence on the part of the state tends to establish its claim and that on the part of the defendant the contrary, it being made plain that the real right of the matter is wholly for them to determine from all the evidence produced. *Ibid.*

6. A jury should not be instructed that if they believe from all the evidence that the testimony of any witness is false they may reject it, nor that whether to reject such testimony or not is conditioned upon whether the same is corroborated by other testimony. *Ibid.*

7. In instructing the jury, a suggestion that belief upon the whole evidence that the testimony of any witness is false precludes its being corroborated by any credible evidence so as to be entitled to be believed, should be avoided. *Ibid.*

8. It is proper to admonish a jury of the importance of agreeing upon a verdict, care being taken not to suggest which way is proper or to go farther than to stimulate appreciation of jury duty. *Ibid.*

9. Reading the information, followed by an instruction, stated in the opinion, is *held* not prejudicial. *Ruth v. State,* 373

10. It is not fatal error to omit instructions relative to circumstantial evidence, unless proper instructions in respect thereto are requested. *Spick v. State,* 104

11. Instructions relative to a defective highway, stated in the opinion (whether correct in law or not), are *held* properly refused as inapplicable to the facts in the case. *Dralle v. Reedsburg,* 319

12. Refusal of instructions not error in view of other instructions given and the lack of evidence on the subject. *Ibid.*

13. Instruction not erroneous because the word "could" was used rather than the words "ought to." *Lehman v. C., St. P., M. & O. R. Co.* 479

14. Failure to instruct on a given subject is not error in the absence of request therefor. *Lind v. Uniform S. & P. Co.* 183

15. In the absence of a request that the words "other things" used in the charge be limited to things shown by the evidence, their use is not prejudicial. *Monaghan v. N. W. Fuel Co.* 457

16. Definitions of proximate cause approved. *Monaghan v. N. W. Fuel Co.* 457; *Stumm v. W. U. Tel. Co.* 528

17. It is not error to instruct the jury to consider whether a fence would have "prevented or tended to prevent" a child from entering on the right of way of a railroad. *Schwind v. C., M. & St. P. R. Co.* 1

18. An instruction, stated in the opinion, is *held* prejudicially erroneous as being argumentative and invading the province of the jury. *Bodenheimer v. C. & N. W. R. Co.* 623

19. Instructions relative to loss of employment consequent on failure to deliver a telegram *held* free from error. *Stumm v. W. U. Tel. Co.* 528

20. Charge that the testimony of a witness is negative in character and not entitled to the same weight as that of another is erroneous. *Bodenheimer v. C. & N. W. R. Co.* 623

INSURANCE.

FIRE.

Risks and causes of loss: Direct loss or damage by fire.

1. A fire built in a furnace with unsuitable material, which became in a measure uncontrollable and developed excessive and extraordinary heat, so intense in the chimney as to char woodwork, wall paper, and furniture, and which caused volumes of smoke and soot to escape through the registers and injure personal property in the house, was a "hostile" fire although there was no ignition outside of the furnace; and the damage to the personal property was "direct loss or damage by fire" within the meaning of the Wisconsin standard fire insurance policy. *O'Connor v. Queen Ins. Co.* 388

2. The question whether damage to insured property was caused by fire is ordinarily one for the jury, but its determination by the court is not error where the facts are practically undisputed. *Ibid.*

LIFE.

Proofs of death: Waiver.

3. Refusal of a benefit association to recognize any claim based on the presumption of death resulting from absence was a waiver of its right to insist upon proofs of death as a condition precedent to an action on the benefit certificate. *Miller v. Sovereign Camp,* 505

Premiums: Rebating by agency contract: Estoppel.

4. A life insurance company having given a person with his policy an agency agreement, stipulating to pay him annually a *pro rata* part of a specified percentage of all premiums paid for the ensuing ten years on business written in specified territory, such payment to be made within thirty days after the anniversary date of the agreement, coinciding with the last day for paying annually a policy premium with a specified penalty to prevent lapsing, and the premiums having been made payable annually with an option to pay quarterly, and the assured having been duly specifically notified of the due date and amount of the second policy premium, the first apportionment under the contract being applied thereon, and he having paid accordingly, and due notice according to custom having been given as to the third premium and second agency apportionment and payment made of the quarterly amount, less such apportionment, and the company, while retaining the money, having claimed that only one quarter of the agency apportionment was applicable on a quarterly premium payment, and demanded payment of an additional amount equal to three fourths of the agency apportionment within the thirty days for payment with the added penalty, which demand was not complied with, and thereupon the company having invited the assured to apply for reinstatement under the agreement in the policy in that regard, representing that, by the contract, he was entitled to credit of only one quarter of such apportionment on a quarterly premium, and application having been made accordingly and allowed, the additional payment being the same as the unpaid agency amount due and payable as aforesaid:

(a) The giving of the premium notice in the second instance, as in the first, estopped the company from claiming that the entire agency apportionment was not applicable upon the amount

payable on the policy within the time stipulated for payment of such apportionment.

(b) The premium notice showing application of the agency apportionment in the second as in the first instance, constituted an actual payment of the agency apportionment fully executing the rebating contract, if such there were, for the quarter the policy premium was payable.

(c) The notice to the assured after payment of the amount, unsatisfactory to the company, demanding only an additional amount equal to three fourths of the agency apportionment, waived the penalty for not making payment on the exact due date of the premium if a penalty were thereby incurred.

(d) There having been due and payable to the assured on the contract by the day limited for paying the policy premium, an amount equal to the balance claimed by the company on the policy, it was bound to apply the credit if necessary to prevent a lapsing, and the application should be treated as having been in effect made by operation of law.

(e) The assured having acted on the false representations of the company in submitting to its claim that the policy had lapsed was not affected by the law of surrender of rights by acquiescence. *McNaughton v. Des Moines L. Ins. Co.* 214

Same: Enforcement of contract.

5. If an insurance company makes, ostensibly, an agency contract with a policy-holder at the date of his policy, all as one transaction, for the purpose, in fact, of rebating the cost of the insurance, stipulated in the policy, such contract is unenforceable. *McNaughton v. Des Moines L. Ins. Co.* 214

6. The circumstance of a life insurance company contemporaneously making an insurance agency contract with, and issuing to a person a life policy, the contract stipulating for payment to the assured for services, not definitely mentioned except by reference to an application for such contract, not produced, of a percentage each year of the premiums received in such year for insurance written in specified territory, is not of itself sufficient to show with reasonable certainty that the purpose of the contract is to circumvent the statutory prohibition against rebating policy premiums. *Ibid.*

7. An executed agreement for rebating a policy premium contrary to the statute on the subject renders the rebater liable to the statutory penalty but does not render the policy void or voidable. *Ibid.*

8. In case of an insurance company seeking to reap advantage from its own turpitude as to violating the law against rebating, for the purpose of avoiding a policy agreement, the burden is upon it to establish the facts in that regard to a reasonable certainty. *Ibid.*

Lapse of policy.

9. If a person, erroneously supposing his policy to have lapsed, his view in that regard being induced in whole or in part by a false position on the part of the insurer, applies successfully for reinstatement under the clause of the policy permitting it, he is not precluded thereby from thereafter insisting that the policy did not in fact lapse. *McNaughton v. Des Moines L. Ins. Co.* 214

Same: Application of earnings under agency contract.

10. If money is absolutely due and payable from an insurance company to a policy-holder before the due date of his premium the company should apply the credit if necessary to save the policy, and in judicial proceedings involving the matter such application should be conclusively presumed to have been made, especially if such had been the custom of the company as to the particular policy. *McNaughton v. Des Moines L. Ins. Co.* 214

INTEREST. See ATTACHMENT, 1.

INTERURBAN RAILWAYS. See STREET RAILWAYS, 1, 2.

INTOXICATING LIQUORS.

A conviction of selling intoxicating liquors without a license is *held* to be sustained by the evidence in this case. ***Markley v. State,*** 137

INTOXICATION. See MASTER AND SERVANT, 28.

JOINDER OF CAUSES OF ACTION. See CORPORATIONS, 7. PLEADING, 3.

JUDGMENT.

Conclusiveness of adjudication. See TAX TITLES, 9.

Same: Presumption as to preliminary proceedings.

In a proceeding in a court of general jurisdiction, where no question of want of jurisdiction is raised, it will be presumed in the absence of a contrary showing that the necessary steps were taken for the entry of judgment, although not all such steps necessary to regularity appear of record. *Wolf v. G. B., O., M. & S. W. R. Co.* 337

JUDGMENT ROLL. See APPEAL, 1.

JURISDICTION. See CERTIORARI. INDIANS, 1. JUDGMENT.

JURORS.

Competency.

A person called as a juror who discloses on the *voir dire* conscientious scruples against rendering a verdict on circumstantial evidence alone, may properly be rejected as incompetent, with or without objection by counsel. *Spick v. State,* 104

Fees. See COSTS, 2.

JUSTICES' COURTS.

Appeal: Review: Evidence considered.

The circuit court when required to give judgment pursuant to sec. 3769, Stats. (1898), should act solely upon the evidence upon which the court below acted, not considering any ruled out by the latter as improper or any conjecture as to evidence which might have been given by answering questions not permitted, because thought to be objectionable. *Luckow v. Boettger,* 62

JUSTIFICATION. See CONSPIRACY.

LANDLORD AND TENANT. See MILLS AND MILLDAMS, 8. PARTITION, 2.

LARCENY.

See MALICIOUS PROSECUTION.

1. Although the maker of a negotiable note had perhaps a right to rescind, for failure of consideration, an entire contract as part of which such note was executed and delivered, yet, until such rescission at least, the note was the property of the payee and was subject of larceny. *Farrell v. Phillips*, 611

2. A felonious intent to deprive the possessor of the thing taken being essential for larceny, if one openly takes property under the honest though mistaken belief that he himself has title, the act ordinarily will not be larceny; but the claim of title must be at least colorable and be made in entire good faith. A taking by artifice or fraud or accompanied by acts of concealment will raise a strong inference of felonious intent. *Ibid.*

LAW OF THE CASE. See APPEAL, 27.

LICENSE. See INTOXICATING LIQUORS. MUNICIPAL CORPORATIONS, 7.

LIFE INSURANCE. See INSURANCE, 3–10.

LIMITATION OF ACTIONS.

Limitations applicable to particular actions. See CANCELLATION OF INSTRUMENTS, 1.

Computation of period of limitation. See MILLS AND MILLDAMS, 7–9. STREET RAILWAYS, 1.

Operation and effect of bar. See MILLS AND MILLDAMS, 3–9. NAVIGABLE WATERS, 3.

LOCAL LAWS. See CONSTITUTIONAL LAW, 1, 2, 5–7.

MALICE. See CONSPIRACY. MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

Probable cause. See TRIAL, 5.

In an action for a malicious prosecution of plaintiff for larceny of a note, under the evidence, stated in the opinion, it is *held* that defendant had probable cause for the prosecution. *Farrell v. Phillips*, 611

MANDAMUS.

Nature and grounds. See MUNICIPAL CORPORATIONS, 13, 14.

Subjects and purposes of relief. See DRAINS, 2.

1. Although relator may have a clear legal right to have an act done, *mandamus* will not issue to compel performance by another unless it is the clear duty of the latter to perform at the time and in the manner demanded. *State ex rel. Redenius v. Waggenson*, 265

2. Where the right to have an act done at the time and in the manner demanded is dependent on some other act having been done or some condition existing, the petition for *mandamus* must show that such preliminary act has been done or condition created. *Ibid.*

3. Where the doing of an official act requires the expenditure of money, performance will not be coerced by *mandamus* in absence of a showing that money therefor is presently available. *Ibid.*

4. *Mandamus* will not lie to control or review the exercise of the discretion of any court, body, or officer when the act performed is judicial or *quasi*-judicial; although it may be invoked to compel the exercise of such discretion. *State ex rel. Wagner v. Dahl*, 301

MANDATORY STATUTES. See STATUTES, 2.

MASTER AND SERVANT.

The relation: Creation and existence.

1. Where, either by necessary implication or by the terms of his contract of service, a railway employee is required to travel on the trains of the company to or from the place or places of his active duty, he is deemed to be in the service of his employer while so traveling, if he be in the proper place upon the train. *Kunza v. C. & N. W. R. Co.* 440

2. If such an employee knew or ought to have known that he had no right to ride on the engine, but voluntarily and without permission went there for his own purposes, he could not be considered as an employee while so riding, but as a trespasser, or at most a licensee. *Ibid.*

3. Whether in this case the plaintiff, a pumper whose duties required him to ride back and forth daily on trains between pumping stations, and who was injured by a collision while riding on the engine, was justified in believing that he was entitled to ride on the engine if he chose to do so, is *held*, upon the evidence, to have been a question for the jury. *Ibid.*

4. If in such case plaintiff believed and was justified in believing that he was entitled to ride on the engine while traveling between stations as his duties required, he was while so riding a servant of the railway company and "engaged in the line of his duty as such," within the meaning of subd. 2, sec. 1816, Stats. (Laws of 1907, ch. 254), even though he at times voluntarily or by request did firing for the engineer; and the jury should then determine whether he was guilty of contributory negligence in so riding instead of riding in the caboose as he might have done on the occasion in question, and, if so, whether such negligence was slighter or greater than the negligence of another employee which caused the collision. SIEBECKER, J., dissents in part, being of the opinion that, upon the established facts, as matter of law the plaintiff had a right to ride on the engine and was not guilty of negligence in so doing. *Ibid.*

Same: Termination and discharge.

5. Under proof that a contract of employment was not terminated because plaintiff failed to comply with any of its conditions or obligations, nor because he failed to conduct the business in a satisfactory manner, it is no defense to an action for its breach by the employer that the contract authorized discharge for such failures. *Richey v. Union Central L. Ins. Co.* 486

Services and compensation: Entirety of contracts.

6. If a contract of employment is for a term and is silent as to the time of payment, although the rate of compensation is at so much a day, week, or month, it is entire and indivisible and full performance must precede a right of recovery, in the absence of circumstances showing that the contract was not understood by the parties as entire; but if the contract contains

language which obligates the employer to make partial payments of compensation it is divisible and action may be maintained on instalments as they become due before performance is completed. *Tilton v. J. L. Gates L. Co.* 197

Master's liability for injuries to servant: Tools, machinery, and appliances: "Simple tools."

7. A pick or hammer used by locomotive firemen for breaking up coal and consisting of a wooden handle about three feet long inserted in an iron cross-head having a hammer face on one end and pick point on the other is a simple tool which the master is not bound to inspect to ascertain the development of defects or disrepair in the course of its use. *Lehman v. C., St. P., M. & O. R. Co.* 497

8. In an action by a locomotive fireman whose eye was injured by a piece of coal flying into it when he struck a large lump of coal with a pick or hammer which was defective by reason of its face having become worn and rounded by use, the question whether, in seizing the hammer and striking the blow without looking at it at all, the plaintiff exercised ordinary care, was a question of fact for the jury. *Ibid.*

9. In the rule that a servant is not bound to *inspect* machinery and appliances furnished by the master, but may rely upon the master to furnish safe tools and appliances, the word "inspect" refers to a somewhat careful or critical examination; and a servant may be negligent in using a tool without even glancing at it, if, as a matter of fact, ordinarily prudent and careful persons are accustomed to look at such tools before using them under similar circumstances. *Ibid.*

10. It cannot be held in such a case that because the servant did not know of a defect in the tool he could not have anticipated that an injury might result therefrom and therefore that his omission to look at it did not proximately contribute to an injury so resulting. He must be deemed to have known that which he would have learned had he exercised ordinary care. *Ibid.*

[11. Whether findings in a special verdict, to the effect that a simple tool which a servant was using when injured was in a defective condition and that such defective condition was the proximate cause of his injury, were sufficient or insufficient to convict the master of negligence, not determined.] *Ibid.*

12. If in such a case the special verdict was insufficient upon the question of defendant's negligence, the court, having rendered judgment for the defendant, will be deemed to have determined upon the evidence that defendant was not negligent. Sec. 2858*m*, Stats. (Laws of 1907, ch. 346). *Ibid.*

13. An instruction to the effect that if the tool plaintiff was using was defective, and if by the exercise of ordinary care he "could" have examined it and observed its condition before using it, he was guilty of contributory negligence, was not erroneous because the word "could" was used rather than the words "ought to." *Ibid.*

Same: Machinery. See MASTER AND SERVANT, 29, 32.

14. To show that there was no negligence in failing to equip with a splitter a ripsaw at which plaintiff was working when injured, a witness for defendant testified that it was impracticable to equip the saw with a splitter attached in a particular way. On the cross-examination plaintiff was permitted to show by the

witness that after the accident a splitter was attached to the saw in another way. *Held* proper, it not being necessary to limit the cross-examination to the exact words of the direct examination, and the evidence being admitted only for the purpose of showing the practicability of so equipping the saw. *Nelson v. A. H. Stange Co.* 657

Same: Unsafe places for work. See CARRIERS, 1, 2.

15. The rule requiring the master to furnish his servant with a reasonably safe working place calls only for a working place free from all dangers which a person in the circumstances of the master, in the exercise of ordinary care, ought to know of, and which, under the circumstances, the servant, in the exercise of ordinary care, is not legally chargeable with knowledge of. *Glenesky v. Kimberly & Clark Co.* 52

16. In an action for death of an employee in defendant's factory who fell into an unguarded opening caused by the raising of a trap door in the top of a tank of hot water, it is *held* upon the evidence to have been a question for the jury whether such opening could have been guarded by barriers or other safeguards without unreasonably interfering with the work which was being carried on and which could not be performed with the door closed. *Lind v. Uniform S. & P. Co.* 183

17. Evidence that after the accident defendant placed guards around the opening was not competent to show negligence in not having it guarded at the time of the accident, but when offered merely to show that it was feasible to place such guards was competent and was properly admitted as part of plaintiff's case in chief. *Ibid.*

18. Failure to instruct the jury that such evidence was no proof of defendant's negligence was not error in the absence of a request for such instruction. *Ibid.*

19. What may be a proper and sufficient barrier or guard with reference to servants having no duty to perform about dangerous machinery is not necessarily so for one who, in oiling such machinery, is obliged to lean over the barrier and bring his hands and other parts of his body in close proximity to rapidly revolving gearings. Such a servant is entitled to have those gearings securely guarded or fenced for his safety, if practicable without seriously impairing the efficiency and use of the machinery. *Monaghan v. N. W. Fuel Co.* 457

Same: Warning and instructing servant.

20. A master is not required to instruct a servant as to the existence of danger, unless it is reasonably to be apprehended that the circumstances requisite to set that danger in motion may probably occur. *Glenesky v. Kimberly & Clark Co.* 52

21. Failure of the master to instruct a servant as to matters which the servant must have known in consequence of his employment does not constitute actionable negligence. *Ibid.*

Same: Risks assumed by servant. See CARRIERS, 1. MASTER AND SERVANT, 25, 26, 31.

22. Employees do not assume the risks arising from negligent failure of the employer to surround vats containing hot liquids with proper safeguards as required by sec. 1636*j*, Stats. (1898). *Lind v. Uniform S. & P. Co.* 183

23. Sec. 1636*jj*, Stats. (Supp. 1906; Laws of 1905, ch. 303), providing that, in an action by a servant for personal injuries caused by

negligent omission of the master to securely guard dangerous machinery, the fact that the servant continued in the employment with knowledge of such omission shall not operate as a defense, has eliminated assumption of risk from the defense of contributory negligence in such cases. *Monaghan v. N. W. Fuel Co.* 457

24. A servant engaged in unusually hazardous building and repairing operations, where he knows that conditions are constantly changing, assumes all the risks ordinarily present in such dangerous operations. *McPherson v. G. N. R. Co.* 473

Same: Contributory negligence of servant. See MASTER AND SERVANT, 4, 9, 10.

25. In an action for death of an employee caused by negligent failure of the master to surround vats containing hot liquids with proper safeguards as required by sec. 1636*j*, Stats. (1898), contributory negligence of the deceased other than assumption of the risk may be shown and may constitute a defense. *Lind v. Uniform S. & P. Co.* 183

26. Contributory negligence of the decedent is *held* not to have been conclusively established in this case, there being evidence from which the jury might infer that at the time he fell into an opening in the top of a vat containing hot water the steam arising therefrom was so dense that he became confused or partially lost his way. *Ibid.*

27. Contributory negligence is an affirmative defense and the burden of establishing it is upon the defendant whether the evidence to establish it be given by witnesses for plaintiff or for defendant. *Achtenhagen v. Watertown*, 18 Wis. 331, distinguished. *Ibid.*

28. In an action for death involving the question of decedent's contributory negligence, evidence that he had been intoxicated on former occasions was inadmissible. *Ibid.*

29. Upon the issue of contributory negligence of a servant who was injured while oiling machinery, evidence as to how other servants had done the same work was competent to show that he was doing it in the usual and ordinary way. *Monaghan v. N. W. Fuel Co.* 457

30. A servant engaged in repairing a railroad bridge, who, while working under the track, reached up and placed his hand on the rail without looking to see whether a push car, which he knew might be run over the track at any time, was in use or not, was guilty of negligence, precluding recovery for injuries to his hand by the car. *McPherson v. G. N. R. Co.* 473

31. It is not essential to the existence of a legal causal relation between a servant's negligence and an injury sustained by him that he should have anticipated the precise injury which occurred. It is sufficient if the negligent act was one from which an ordinarily prudent person might anticipate some injury to himself. *Lehman v. C., St. P., M. & O. R. Co.* 497

Master's liability for acts of servant. See MUNICIPAL CORPORATIONS, 26, 27.

Instructions to jury.

32. The jury were instructed that in answering, in the special verdict, a question as to whether the machinery in which plaintiff was injured was so located as to be dangerous to employees in

the discharge of their duties, they should consider "among other things" the location of the machinery with reference to where it became reasonably necessary for employees to be situated in the discharge of their duties in and about it, and its situation and surroundings as shown by the evidence. *Held*, that presumably the jury understood that the "other things" were limited to things shown by the evidence, and in the absence of any request for an instruction to that effect there was no prejudicial error. *Monaghan v. N. W. Fuel Co.* 457

MAXIMS.
De minimis non curat lex, 408, 412.
Falsus in uno, falsus in omnibus, 106, 122, 123.
Nemo est hæres viventis, 575.
Respondeat superior, 315.

MAYOR. See MUNICIPAL CORPORATIONS, 8–14.

MEASURE OF DAMAGES. See ATTACHMENT, 1. DAMAGES, 6–10. HIGHWAYS, 17.

MENTAL CAPACITY. See WILLS, 1.

MILK. See FOOD. MUNICIPAL CORPORATIONS, 7.

MILLS AND MILLDAMS.

See CONSTITUTIONAL LAW, 7–9. CORPORATIONS, 2–4. EMINENT DOMAIN, 2. NAVIGABLE WATERS, 1, 3.

1. The words "any milldam" in subd. 3, sec. 4221, Stats. (1898),—first enacted as ch. 184, Laws of 1862,—do not relate merely to dams across nonnavigable streams authorized by ch. 146, Stats. 1898 (ch. 56, R. S. 1858), but include a dam built across a navigable stream for the purpose of creating water power to operate mills. *Green Bay & M. C. Co. v. Telulah P. Co.* 417

2. A dam erected to create power to operate mills, which power is used exclusively for that purpose, is a milldam within the meaning of subd. 3, sec. 4221, Stats. (1898), although the corporation erecting it has no power itself to operate mills, but merely leases or sells the power to mill owners while retaining title to the dam itself. *Ibid.*

3. Subd. 3, sec. 4221, Stats. (1898), has the effect to confer title at the expiration of the ten years within which an action for damages for the flowing of lands by a milldam must be commenced, and bars, therefore, an equitable action to restrain the maintenance of the dam as well as an action for damages. *Ibid.*

4. The raising, by a milldam, of the water wholly within the banks of a river, thereby lowering the available head of the water at an upper dam and covering with a greater depth of water the bed of the river at and below the upper dam, is a flowing of the lands of the owner of such upper dam and river bed, within the meaning of subd. 3, sec. 4221, Stats. (1898). *Ibid.*

5. A finding by the court that for a period of more than ten years the setting back of the water upon plaintiff's land by defendants' milldam had been "uninterrupted, continuous, open, notorious, and adverse, and so as to maintain on plaintiff's land the same water level in the same stages of water," covered all the elements necessary to render operative the bar of subd. 3, sec. 4221, Stats. (1898). *Ibid.*

6. The word "adverse" in such a finding, while it embodies a conclusion of law, is also a comprehensive statement of an ultimate conclusion of fact embracing all the elements necessary to make possession adverse. *Ibid.*

7. Proof that a milldam was completed in a certain year, without fixing the exact date, does not show that an adverse flowage of land thereby began before the last day of that year. *Ibid.*

8. The fact that for a part of the ten years during which, as defendants claimed, the lands of plaintiff, the owner of an upper dam, had been flowed by means of a lower dam, the general manager of one of the defendants acted as principal manager of the lower dam and was also general manager of a corporation which had leased from the plaintiff certain amounts of water power from the upper dam and certain lots below that dam, did not prevent the flowage from being adverse to plaintiff during the whole of said ten-year period, in the absence of a showing that the property so leased from plaintiff was in any way interfered with or encroached upon by the setting back of the water from the lower dam. The doctrine that a tenant cannot deny his landlord's title or acquire a hostile title while the tenancy continues has no application to such a case. *Ibid.*

9. The fact that a dam across a navigable river is an unlawful structure because it obstructs the river without legislative authority, does not prevent the acquirement by prescription of the right to maintain such dam as against individual owners of lands above the dam. *Ibid.*

MORTGAGES. See PLEADING, 4.

MULTIPLICITY OF ACTIONS. See INJUNCTION, 1.

MUNICIPAL CORPORATIONS.

General charter. See SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

Creation: Territorial extent: Villages.

1. The legislature, having the power to create villages, necessarily has a large discretion in the matter of determining what their boundaries shall be; and the courts will interfere with legislative action in that matter only when the discretion has been abused and there has been a violation of sec. 3, art. XI, Const., or of sec. 23, art. IV. *Fenton v. Ryan,* 353

2. Restrictions upon the size and with respect to density of population of territory which may be included in an incorporated village must be implied from the name of the corporation and the purpose for which it is incorporated. *Ibid.*

3. It may well be that it is competent for the legislature to say, as in sec. 854, Stats. (1898), that the area of a village to be incorporated shall not be less than one half a square mile, on the ground that territory to that extent is reasonably necessary to carry out the purposes for which villages are incorporated. *Ibid.*

4. The inclusion in a new village of territory, in excess of one half a square mile, consisting of sparsely settled rural or agricultural lands not having the distinctive characteristics of a village or any natural connection therewith, and not reasonably appurtenant and necessary for the future growth of the village, would be an invasion of the uniformity in town and county government required by sec. 23, art. IV, Const. *Ibid.*

5. Whether, in a given case, the territory in excess of one half a square mile which it is proposed to include in a new village is such that it may properly be included therein, is a question for the courts. A *dictum* to the contrary in *In re North Milwaukee*, 93 Wis. 616, *held obiter*. *Ibid.*

6. A holding by the circuit court in this case that a water area of seventy-five acres embraced within the boundaries of a proposed village should be included as part of the one-half square mile provided for by sec. 854, Stats. (1898), was not erroneous; nor was it tantamount to a holding that no village could be incorporated which bordered on a large body of water, since the petitioners need not include water areas in their proposed boundaries, nor is there any statutory limitation of the area of the village other than that it shall not include the entire town or towns. *Ibid.*

Governmental powers and functions. See STATES.

Legislative control. See SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

Proceedings of common council. See SCHOOLS AND SCHOOL DISTRICTS, 2.

Same: Ordinances: Police regulations: Public health.

7. Under charter authority to tax, regulate, and restrain vendors of milk and to regulate and restrain the sale of milk, a common council has power to pass an ordinance vesting the power of issuing and revoking licenses in the city health officers, with the right to exercise the power of revocation summarily and even without notice. Language in *State ex rel. Sepic v. Milwaukee*, 129 Wis. 562, that the words "regulate" and "restrain" do not in any sense mean "revoke," considered and overruled. *State ex rel. Nowotny v. Milwaukee*, 38

Officers: Mayor: Powers: Appointment, suspension, and removal of subordinates.

8. A city charter declaring that the mayor shall be "the chief executive officer and the head of the fire department and of the police in said city" and that he shall "take care that the laws of the state and the ordinances of the city are duly observed and enforced," confers upon the mayor all of the power of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment, and does not make him a mere administrative officer. *State ex rel. Davern v. Rose*, 360

9. The executive power conferred upon the mayor by such a charter includes the power to appoint and remove subordinate executive officers at discretion, except as qualified by other charter provisions. *Ibid.*

10. Where a statute (ch. 378, Laws of 1885) amending a city charter vested the power of appointment and removal of the chiefs of the fire and police departments in a board of commissioners, but provided that either of said officers should be subject to suspension from office for cause by the mayor at any time, and that the mayor should at once communicate to said board the charge or charges against an officer so suspended, for the decision of the board thereon, the suspension might be made for any cause which, in the honest judgment of the mayor, might reasonably render it advisable for the public good. *Ibid.*

11. The power and the duty of the mayor as to suspension of officers under such a statute is discretionary in a very high degree. He

may weigh all considerations in determining whether he should exercise the power; and his decision not to exercise it, even where there has been gross dereliction on the part of the subordinate officer, is not subject to review or direction by the courts, unless there has been an entire refusal to consider and exercise discretion. *Ibid.*

12. The mayor in such a case need not declare the reasons for his decision or his action in deciding against suspension, it being enough for him to declare that he deems the public welfare promoted by action or inaction, and even that declaration need only be by the act. *Ibid.*

13. The courts in such a case must indulge in every *prima facie* presumption in favor of the good faith of the executive officer in his discharge of his duties, and only when it is established by the clearest possible evidence that he has wholly refused to exert his jurisdiction or to exercise any discretion whatever can the courts properly interfere by *mandamus*. *Ibid.*

14. Where, upon charges being filed against a subordinate officer, the mayor entered into an investigation, taking various means to inform himself of the facts and of the situation, and declared his conclusion that the charges did not warrant suspension, there was an exercise of the discretion vested in him, and *mandamus* will not lie. *Ibid.*

Same: Suretyship on bonds, etc.

15. In a city charter providing that "no city officer shall be accepted as surety upon any bond, contract or other obligation made *by* the city," the courts cannot substitute the word "to" in place of the word "by," the provision as enacted not being absurd. *Ashland v. Maciejewski*, 642

[16. Whether the words "bond, contract or other obligation" could be construed as applying to a recognizance given on appeal from a municipal court, not determined.] *Ibid.*

Improvements: Streets and sidewalks: Establishing grade lines.

17. A village ordinance permanently establishing the grades of streets at the centers and at the parkings at the curb lines, and providing that "said parking shall rise from such curb line to the lot line at a uniform grade of not less than one fourth of one inch to each foot," fixes the grades for the sidewalks, superseding grades theretofore prescribed. *Blanke v. Genoa Junction*, 211

18. Where, with full knowledge of a change in the grade prescribed for a sidewalk and in defiance of a written notice and order from the village board, a lotowner constructs a walk in accordance with the former grade, the village officials have the right to order the removal of such walk and, in case of disobedience, to proceed to its demolition. *Ibid.*

Same: Service pipes to curb line.

19. The word "may" in sec. 925—223, Stats. (1898), providing that whenever the city council shall order the paving or repaving of a street in which gas or water mains, or sewers, or either of them, have previously been laid, they *may* require service pipes and house drains to be first laid to the curb line, and that no street shall be paved or repaved by order of the council unless the water and gas mains and service pipes and necessary sewers and their connections shall, *as required by the council*,

be first laid and constructed,—is used in its ordinary and natural meaning and is not mandatory. *Gleason v. Waukesha Co.* 103 Wis. 225, in so far as it indicates that a city cannot pave without first requiring such connections to be made, overruled. *Barber A. P. Co. v. Oshkosh*, 58

Same: Restraining corporate action.

20. In an action to restrain a village from making certain street improvements pursuant to petition, it will be presumed on demurrer to the complaint, in the absence of allegations to the contrary, that the village authorities are proceeding according to law. *Bekkedahl v. Westby*, 230

21. The general power in respect to streets and sidewalks conferred upon the village board by subd. 11, sec. 893, Stats. (1898), includes the power to determine the width of the traveled track in a street. *Ibid.*

22. Allegations in a complaint that a village board intends and threatens to compel plaintiff to build a sidewalk outside of the street and upon his residence lot, and that in order to do so he will be deprived of his land without due process of law and without compensation, do not show a right to an injunction where it is evident from the facts pleaded that defendants do not intend to compel plaintiff to build a walk by force or otherwise than by legal procedure regularly instituted and carried on. *Ibid.*

Same: Invalidity of contracts: Ratification: Recovery by contractor.

23. Ch. 677, Laws of 1907, purporting to validate certain classes of paving contracts theretofore made by "any municipal corporation of the first class," relates to the city of Milwaukee, which is the only city then or ever theretofore in the first class of cities by legislative classification according to population, and relates wholly to past conditions. It is therefore a special law amending the charter of that city and within the condemnation of secs. 31, 32, art. IV, Const. *Cawker v. Central B. P. Co.* 25

24. Where a municipal paving contract is invalid for failure to comply with charter requirements, the city cannot thereafter validate it by ratification without compliance with such charter provisions. *Ibid.*

25. Where a street-paving contract is void for failure to comply with charter provisions, the contractor cannot go on and complete it and recover upon *quantum meruit*. *Ibid.*

Police power. See TELEGRAPHS AND TELEPHONES, 1, 2.

Waterworks: Liability for negligent operation.

26. In selling and distributing water to its citizens by means of a system of waterworks a city is acting not in its governmental but in its private or proprietary capacity, and is liable in damages for negligence of its agents and servants in the conduct of such business. *Piper v. Madison*, 311

27. The fact that the city may also use the waterworks for protection against fire does not relieve it from liability for negligent acts of its servants or agents in the conduct of the business, except for such acts as are performed by them in the actual work incident to extinguishing fires. *Ibid.*

MUNICIPAL COURTS. See CONSTITUTIONAL LAW, 3, 4. COURTS, 8, 9.

MURDER. See CRIMINAL LAW, 3. HOMICIDE.

NAVIGABLE WATERS.

Rights of public. See CONSTITUTIONAL LAW, 7–9. CORPORATIONS, 2. DRAINS, 1. EMINENT DOMAIN, 2. MILLS AND MILLDAMS.

1. Evidence, stated in the opinion, *held* sufficient to sustain the finding of the trial court that a pond, created in a nonnavigable creek by the flowage from a dam across such creek, is in fact navigable. *Johnson v. Eimerman,* 327
2. The rights of the public in a small body of water, navigable in fact and constituting a public highway, are as much entitled to protection as they would be in a more pretentious watercourse. *Ibid.*
3. An artificial condition of navigability of a pond originally created by a dam, becomes, by continuance for twenty years, a natural condition. *Ibid.*

NEGLIGENCE.

Acts and omissions constituting negligence. See BANKS AND BANKING, 1, 2. CARRIERS. DAMAGES, 4, 6, 11–15. EVIDENCE, 10–12. HIGHWAYS, 10–18. MASTER AND SERVANT, 7–32. MUNICIPAL CORPORATIONS, 26, 27. RAILROADS, 26–37. STREET RAILWAYS, 3, 4. TELEGRAPHS AND TELEPHONES, 3. TRIAL, 4, 7.

Proximate cause. See CARRIERS, 7. HIGHWAYS, 12. MASTER AND SERVANT, 10, 11, 26–28.

1. It is not error to give to the jury *verbatim* the definition of proximate cause found in *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 288, approved in *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 431. *Monaghan v. N. W. Fuel Co.* 457
2. An instruction giving correctly the definition of proximate cause in the abstract was not erroneous because not phrased to fit the particular facts of the case, where no different or further instruction was requested. *Stumm v. W. U. Tel. Co.* 528

Contributory negligence. See APPEAL, 16. CARRIERS, 6–8. HIGHWAYS, 12. MASTER AND SERVANT, 4, 9, 10, 22–31. RAILROADS, 28. STREET RAILWAYS, 3, 4.

3. The question of contributory negligence is or may be a mixed question of law and fact, but when facts are found in a special verdict showing contributory negligence without room for conflicting inferences, the conclusion of law necessarily follows, and the court may properly change the answer to another question whereby the jury finds that there was no contributory negligence. *Vetter v. Southern Wis. R. Co.* 296

Comparative negligence. See MASTER AND SERVANT, 4.

NEW TRIAL.

See CRIMINAL LAW, 25, 26.

1. Although a written opinion of the trial judge indicates his reasons for granting a motion to set aside a verdict, yet the subsequent order setting it aside upon grounds expressly stated therein is the authentic and official evidence as to such grounds. *Nelson v. A. H. Stange Co.* 657
2. Where defendant appealed from an order granting to plaintiff a second new trial, but not from the order granting the first, af-

firmance of the order appealed from conclusively adjudicated that plaintiff was entitled to a new trial and that a new trial must follow that order; hence the verdict on the first trial could not thereafter be reinstated and judgment entered thereon. *Ibid.*

[3. The order setting aside the verdict on the first trial having been made on the ground that a material issue of fact had not been submitted to the jury and because the trial judge was not satisfied with the conduct of the trial and the instructions to the jury as a whole,—whether another judge, before whom the cause was brought by change of venue, could, had there been no adjudication on appeal, set aside such order of his predecessor, not determined.] *Ibid.*

NEXT OF KIN. See INSANE PERSONS.

NOMINAL DAMAGES. See DAMAGES, 8.

NOTICE.
Of claim. See RAILROADS, 35.
Of injury. See HIGHWAYS, 13, 14.
Of tax sale. See TAX TITLES, 1–5.

OBSTRUCTIONS. See HIGHWAYS, 10–12. TELEGRAPHS AND TELEPHONES, 1, 2.

OFFER. See SUBSCRIPTIONS.

OFFICERS.

Appointment and removal. See COURTS, 3–7. MUNICIPAL CORPORATIONS, 8–14.

1. Where no definite term of office is fixed by law, the power to remove an incumbent is incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary. *State ex rel. Wagner v. Dahl,* 301

2. An office is not regarded as property, nor is the right to hold office a vested one. *Ibid.*

3. The power of amotion from office is not a judicial but an administrative power, though it be exercised in a judicial manner. *Ibid.*

4. Under sec. 22, ch. 363, Laws of 1905, where an appointing officer in removing an employee acted within his jurisdiction, *i. e.* when the cause assigned is a "just cause" within the meaning of the statute, and there is nothing to show that he acted arbitrarily or in bad faith, the courts will not review his decision as to the fact of the existence of such cause. *Ibid.*

Discretion: Interference by courts.

5. Courts have no right to interfere with the exercise of the discretion vested in executive officers, state or municipal. *State ex rel. Davern v. Rose,* 360

6. No wrong, in the legal sense, results when one receives all that the law accords him; and when the only right of an individual or of the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right. *Ibid.*

7. Where an absolute duty, involving nothing of judgment or discretion, has been imposed upon an administrative or executive officer, performance thereof may be enforced in a proper case by the courts, if no other adequate method is provided. *Ibid.*

Obedience to law: Presumption.

8. The presumption is that public officers will obey the laws and not wantonly or criminally violate them. *State ex rel. Wagner v. Dahl,* 301

Compensation. See COURTS, 7.

Rights and powers. See HEALTH. HIGHWAYS, 10–12. MUNICIPAL CORPORATIONS, 8–16.

OPINION EVIDENCE. See EVIDENCE, 8–12. HIGHWAYS, 14.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1, 7, 17.

PARENT AND CHILD. See CONTRACTS, 1, 2. DESCENT AND DISTRIBUTION. DOMICILE. HUSBAND AND WIFE, 3. INDIANS.

PARTIES.

Real party in interest. See RAILROADS, 37.

Proper parties. See HUSBAND AND WIFE, 1.

Necessary parties. See EJECTMENT, 6, 7. PARTITION, 2.

New parties.

Where in an action of replevin it appeared from the pleadings and from the verdict on an issue in abatement that a third person was jointly interested with plaintiff in a written contract under which the property in question was claimed by defendant to have been delivered to him in part payment for land, the court should not have ordered the action abated, but under sec. 2610, Stats. (1898), should have stayed the proceedings and ordered such third person brought in as a necessary party plaintiff. *Swenson v. Wells,* 316

PARTITION.

1. A tenant in common of land leased to others may maintain an action for partition under sec. 3101, Stats. (1898), the lessees' possession being that of the owners; and if one or more of the lessees purchase the interest of one of such owners they succeed to his rights and may have partition. *Peterman v. Kingsley,* 660

2. Lessees of land are not necessary parties to an action for partition between the lessors, their rights not being affected. If the land is to be sold in such action it must be sold subject to the leases. *Ibid.*

PAYMENT. See BANKRUPTCY. INSURANCE, 4. TAX TITLES, 6.

PENSIONS.

1. Under sec. 4747, R. S. of U. S., as construed by the federal supreme court, pension money is only exempt from claims of a pensioner's creditor while it is "due, or to become due, to any pensioner." *Joyce v. Russell,* 583

2. By such construction the words of the statute, "shall inure wholly to the benefit of such pensioner," relate to the words "due, or to become due," and have no force after the public obligation has been discharged by delivery of the money to the pensioner or his agent. *Ibid.*

3. Whether *Folschow v. Werner,* 51 Wis. 85, holding to the contrary of the federal construction, should be adhered to, this court

may properly decline to state, further than is necessary to facts as presented, requiring a decision. *Ibid.*

4. Notwithstanding *Folschow v. Werner*, pension money, under the federal statute, is not exempt from claims of creditors of the pensioner after the money has been paid to him and converted into other property. *Ibid.*

PERSONAL INJURIES. See CARRIERS. DAMAGES, 11–15. EVIDENCE, 10–12. HIGHWAYS, 10–12. MASTER AND SERVANT, 7–32. RAILROADS, 26–31, 35–37. STREET RAILWAYS, 3, 4. TRIAL, 4, 7.

PHYSICIANS AND SURGEONS. See EVIDENCE, 9.

PLEADING.

Form and allegations in general.

1. A relation of mere evidentiary circumstances may properly be stricken from a complaint. *Koenig v. Koenig*, 618

Same: On information and belief. See PLEADING, 4.

Complaint. See APPEAL, 20. CONTRACTS, 17. CORPORATIONS, 6, 7. INJUNCTION, 2. MUNICIPAL CORPORATIONS, 22. PLEADING, 1.

Same: Election between causes of action.

2. It was not prejudicial error to refuse to compel plaintiff to elect on which of two causes of action he would proceed, where the second was pleaded for the sole purpose of claiming a recovery for labor and services in case the contract of employment alleged in the first was found not to have been made, and plaintiff at the close of his affirmative case discontinued as to the second cause of action and apprised defendant that he stood on the contract and its alleged breach. *Richey v. Union Central L. Ins. Co.* 486

Same: Joinder of causes of action.

3. The mere fact that unnecessary or even improper relief is prayed for does not show that more than one cause of action is stated. *Seering v. Black*, 413

Answer. See EJECTMENT, 3–8. MASTER AND SERVANT, 5.

Same: Frivolousness.

4. In a foreclosure action the complaint alleged that a note and mortgage were executed by defendants to plaintiffs and that plaintiffs are now the lawful owners and holders thereof. The answer admitted such execution but alleged that defendants "have not sufficient information or knowledge to enable them to form a belief as to whether or not plaintiffs are the lawful owners and holders of the note and mortgage, and therefore deny the same." No fact was stated in the pleadings tending to show that there had been any transfer or change in the ownership of the note and mortgage. *Held*, that the answer was properly stricken out as evasive and frivolous. *Mathews v. Pufall*, 655

Counterclaims. See CONTRACTS, 13. EJECTMENT, 4.

5. The objection that certain counterclaims could not properly be pleaded in the action was waived by failure to demur or reply to them. *Stark v. Duhring*, 521

Cross-complaint.

6. Where a taxpayer has brought an action against a city and a paving contractor to enjoin the collection of the contract price,

an affirmative claim set up by the contractor by cross-complaint against the city for a recovery on implied assumpsit, if sustained, defeats the taxpayer's action, and hence he may challenge the legal sufficiency of the cross-complaint on demurrer. *Cawker v. Central B. P. Co.* 25

Demurrer. See APPEAL, 20. MUNICIPAL CORPORATIONS, 20. PLEADING, 5, 6.

Variance.

7. A defendant who neither demands a bill of particulars nor moves to make the complaint more definite and certain cannot, by objection at the trial, exclude evidence which is comprehended within the broad generalities of the complaint. *Dralle v. Reedsburg,* 319

Duplicity. See SALES, 2.

PLEDGES AND COLLATERAL SECURITY.

A complaint alleges that plaintiff agreed to transfer a note and mortgage to a bank as collateral security for loans, that defendant, the cashier of the bank, by fraudulent statements that it was an assignment as collateral security only, obtained from plaintiff an assignment in form absolutely transferring the note and mortgage to defendant, and that defendant refuses upon demand to surrender such securities; and in effect admits that the loans have not been repaid. *Held,* that no actionable fraud against plaintiff is shown, but simply that his note and mortgage are held by the defendant for the bank as collateral security; and until the loans are repaid defendant is entitled so to hold them. *Doherty v. Wing,* 227

POLICE POWER. See HEALTH. RAILROADS, 5, 19, 24. TELEGRAPHS AND TELEPHONES, 1, 2.

POSSESSION. See CANCELLATION OF INSTRUMENTS, 1. DOWER, 6. EJECTMENT. MILLS AND MILLDAMS, 2–8. REPLEVIN.

PREFERENCES. See BANKRUPTCY.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1–3. HABEAS CORPUS.

PRESCRIPTION. See HIGHWAYS, 9. MILLS AND MILLDAMS, 9.

PRESUMPTIONS. See APPEAL, 11, 15. CRIMINAL LAW, 9, 18, 21. DEATH. DOMICILE. EVIDENCE, 1, 2. HIGHWAYS, 6, 7. INSURANCE, 3, 10. JUDGMENT. MUNICIPAL CORPORATIONS, 13, 20. OFFICERS, 8. SCHOOLS AND SCHOOL DISTRICTS, 4. TRIAL, 4.

PRINCIPAL AND AGENT.

The relation: Rights and duties of agent. See DEEDS, 1. EVIDENCE, 3–5. INSURANCE, 4–10. RAILROADS, 36, 37. SALES, 6.

Rights and liabilities to third persons: Undisclosed limitation on powers of agent.

Defendants having sold the stock of liquors and glassware used in a saloon business and turned the business over to the purchaser, to be continued by him in their name, under licenses issued to them, until the purchase price and cost of the licenses was repaid, a private and undisclosed agreement that he should not commit them to liability for supplies purchased by him for the

business would not protect them against a claim for such supplies by one who dealt with him in the ordinary line of such business without knowledge of the restriction. *Napa Valley Wine Co. v. Casanova*, 289

PRINCIPAL AND SURETY.

See MUNICIPAL CORPORATIONS, 15, 16.

Where the date of the actual completion of a building was September 20, and, as early as June 9, payments had been made to the contractor aggregating upwards of $2,000 in excess of the amounts stipulated to be paid prior to the final completion of the building, the amount of the advanced payments and the length of time in which they antedated the time when they should have been paid are such material variances from the contract as absolutely discharge the contractor's sureties. *Kuns v. Boll*, 69

PRINTED CASE. See APPEAL, 29.

PRIVATE LAWS. See CONSTITUTIONAL LAW, 1, 2, 5–7, 11.

PROBABLE CAUSE. See MALICIOUS PROSECUTION. TRIAL, 5.

PROMISSORY NOTES. See LARCENY. MALICIOUS PROSECUTION.

PROOFS OF LOSS. See INSURANCE, 3.

PROXIMATE CAUSE. See ATTACHMENT, 2. CARRIERS, 7. HIGHWAYS, 12. MASTER AND SERVANT, 10, 11. NEGLIGENCE, 1, 2. RAILROADS, 26–28.

PUBLIC HEALTH. See FOOD. HEALTH. MUNICIPAL CORPORATIONS, 7.

PUBLIC POLICY. See WILLS, 10.

PUBLIC USE. See TAXATION, 1–3.

PUNITORY DAMAGES. See DAMAGES, 5. HUSBAND AND WIFE, 4, 5.

QUANTUM MERUIT. See MUNICIPAL CORPORATIONS, 25.

RAILROAD COMMISSION. See RAILROADS, 1, 2, 6–9, 13–15, 17, 18, 20.

RAILROADS.

Railroad Commission.

1. An order of the Railroad Commission will not be disturbed by the courts unless it is unlawful or unreasonable. *State ex rel. N. P. R. Co. v. Railroad Comm.* 145

Control and regulation: Railroad crossings: Eminent domain.

2. Ch. 454, Laws of 1907, and particularly sec. 1797—56, Stats., vests in the Railroad Commission power to determine the point at which, as well as the manner in which, the track of one railroad shall be crossed by that of another; and the question of compensation only is left to the commissioners appointed by the court under subd. 6, sec. 1828, Stats. (1898). *State ex rel. N. P. R. Co. v. Railroad Comm.* 145

3. The law as it before existed respecting the right of a railroad company to designate its route was not abrogated by ch. 454, Laws of 1907. *Ibid.*

4. A railway company which constructed its road while a statute (subd. 6, sec. 1828, Stats. 1898) was in force under which, as at common law, it could not be required to pay any part of the expense of making and maintaining any subsequent crossing of

its track by the track of another railway, acquired thereby a vested property right which cannot be taken for the benefit of another company without compensation, in the exercise of the reserved right to alter or amend charters. *Ibid.*

5. To compel the senior railway company to pay any part of the expense occasioned by the crossing of its road by the junior company would be a taking of the property of the former; and such a taking without compensation to the senior company would not be a reasonable or valid exercise of the police power. *Ibid.*

6. Sec. 1797—56, Stats. (Laws of 1907, ch. 454), may reasonably be so construed as not to require the Commission to impose any part of the expense of the crossing upon the senior road which would result in a taking of its property without compensation; and in support of the validity of the statute it should be so construed. *Ibid.*

7. When, pursuant to sec. 1797—56, the Railroad Commission imposes upon the senior road a part of the expense of constructing, operating, and maintaining a crossing of its tracks and the prescribed protective appliances, the senior road is entitled to recover in the condemnation proceedings before commissioners appointed by the court (under subd. 6, sec. 1828, Stats. 1898), all damages suffered by it by reason of the crossing, including damages on account of the burden or expense so imposed upon it by the Commission. *Ibid.*

8. This provision of sec. 1797—56, that the Railroad Commission may apportion the expense of the crossing, is not a delegation of legislative power, or a vesting of judicial power in the Commission. *Ibid.*

9. An order of the Railroad Commission apportioning the expense of a crossing, pursuant to sec. 1797—56, should leave the amount of damages occasioned by the crossing to be fixed by the commissioners appointed by the court in the condemnation proceedings under subd. 6, sec. 1828, Stats. (1898). *Ibid.*

Per MARSHALL, J., *concurring:*

10. The right, in a general sense, to construct a railroad is referable to the certificate of public convenience and necessity, under secs. 1797—43 to 1797—53, Stats. (Laws of 1907, ch. 454). *Ibid.*

11. The right to cross the tracks of a senior railroad is referable to subd. 6, sec. 1828, Stats. (1898). *Ibid.*

12. The right to take the property of the senior road at the point of crossing is referable to said subd. 6, sec. 1828. *Ibid.*

13. Authority to locate the place of crossing is referable to the implied power of the Railroad Commission under secs. 1797—54 to 1797—56, and the general spirit of the act of 1907, superseding by necessary inference subd. 6, sec. 1828, Stats. (1898), on that subject. *Ibid.*

14. The manner of constructing the railroad, including the manner of making the crossing with its accessories, and the establishing of status in respect thereto to be dealt with in condemnation proceedings, is referable to the decision of the Railroad Commission under secs. 1797—54 to 1797—56. *Ibid.*

15. The manner of acquiring property for the purposes of the road, including that of any other road at the crossing, is referable to secs. 1845-1851, and such other parts of ch. 87, Stats. (1898), as

bear on the subject, the proceedings to that end to be subsequent to the determination by the Railroad Commission under secs. 1797—54 to 1797—56. *Ibid.*

16. The commissioners in condemnation proceedings are required to deal with the situation created by the determination aforesaid making the owner of the senior road good by an award of a money equivalent for *such* appropriation of its property rights as shall be contemplated in view of such determination, including the cost of *such* grading, rails, frogs, switches, and other appliances used in constructing and maintaining the crossing, and maintaining and operating safety appliances, as shall be preliminarily entailed upon it in view of *such* determination. *Ibid.*

BARNES, J., and WINSLOW, C. J., *dissenting*, are of the opinion:

17. So much of sec. 1797—56, Stats., as empowers the Railroad Commission to require the senior company to bear any portion of the expense of constructing a crossing proper is void because it deprives the company of its property without due process of law; but the invalidity of this particular provision does not affect the remaining portion of the act. *Ibid.*

18. An order of the Commission, not imposing upon the senior company any part of the expense of constructing the crossing proper, but requiring it to defray one half of the expense of maintenance, is not erroneous in the absence of anything to show that such latter expense was a material item or that the half thereof would exceed the cost of maintaining the road at that point had no crossing been made. *Ibid.*

19. Whether a crossing already exists or is to be made, the state, in the exercise of its police power, may require that it be safeguarded by protective appliances, such as interlocking plants, whenever in the exercise of reasonable judgment such devices are deemed to be required for the public safety or convenience, and may make any reasonable apportionment of the expense between the roads affected, without reimbursement to the senior company. *Ibid.*

20. The legislative declaration requiring railway companies to install approved safety devices whenever necessary to protect life or facilitate commerce is implied in the language of ch. 454, Laws of 1907, and in view thereof the delegation of power to the Railroad Commission to determine the fact as to the necessity for such devices at a given point, and to apportion the expense thereof, is valid. *Ibid.*

21. Sec. 1797—56, Stats., should not be construed as giving the senior company any right to recover from the junior, in condemnation proceedings or otherwise, the amount apportioned to and paid by such senior company for the construction or maintenance of safety devices at a crossing. *Ibid.*

Same: Highway crossings.

22. Under sec. 1299*h*—1, Stats. (Laws of 1907, ch. 120),—the company must, by planking or some equivalent therefor, adjust the surface of the highway where it crosses the tracks substantially to a level with the tops of the rails. *Chicago, M. & St. P. R. Co. v. Fair Oaks*, 334

23. Where a portion of the right of way of a railway company is condemned for the purpose of extending a highway across the tracks, the company is not entitled to be compensated for the

expense which it must incur in constructing and maintaining the crossing as required by the statute, such burden being imposed upon it solely for the protection of the public. *Ibid.*

24. The requirement of sec. 1299*h*—1, Stats., is a legitimate exercise of police power for the protection of the safety of the public. *Ibid.*

Same: Fences: Personal injuries to infant.

25. The question whether a given place is or is not depot grounds within the calls of sec. 1810, Stats. (1898), is ordinarily a question of fact. *Schwind v. C., M. & St. P. R. Co.* 1

26. Failure of the statutory duty imposed upon railroad companies to fence their right of way constitutes negligence, and for injuries proximately caused thereby, and not contributed to by the negligence of the person injured, the company is liable. *Ibid.*

27. Where, in addition to the duty imposed upon railroads to fence their right of way, the provisions of the statute impose liability for all damage to persons and animals occasioned "in any manner, in whole or in part, by the want of such fences," an injury may be occasioned in whole or in part by the absence of a fence, although it may not be proximately caused thereby. *Ibid.*

28. Under sec. 1810, Stats. (1898), imposing upon railroads liability for damages to persons and animals occasioned by unfenced right of way, proximate causal relation, including reasonable anticipation, is not necessary, and contributory negligence is no defense; the purpose of the statute being to cast upon railroads absolute liability. *Ibid.*

[29. Whether the deliberate and intentional entry upon a railroad right of way and tracks by an adult fully cognizant of all the conditions, and with no circumstances of confusion or inadvertence, may be held, as matter of law, not occasioned by absence of a fence, not determined.] *Ibid.*

30. Where, in the light of childish tendencies, an injury happens to a child ten years of age upon the unfenced right of way of a railroad, the court cannot say, as matter of law, that his deviation onto the railroad grounds would have so certainly occurred had a fence been interposed as to warrant reversing a finding that the injury was caused in whole or in part by the absence of a fence. *Ibid.*

31. In an action for personal injuries happening to a child walking upon an unfenced right of way, it is not error to instruct the jury to consider whether a fence would have "prevented or tended to prevent" plaintiff's entry on the right of way. *Ibid.*

Right of way. See EMINENT DOMAIN, 5. RAILROADS, 2–21. VENDOR AND PURCHASER, 1–6.

Operation: Injuries to passengers. See CARRIERS.

Same: Injuries to employees. See CARRIERS, 1. MASTER AND SERVANT, 1–4, 30.

Same: Injuries to animals.

32. Upon the evidence in an action for the value of a horse killed on defendant's track it is *held* that the trial court properly refused to direct a verdict for defendant. *Bodenheimer v. C. & N. W. R. Co.* 623

33. The evidence being conflicting as to whether the horse was killed at a highway crossing or north thereof on defendant's track be-

yond a cattle-guard alleged to have been defective, a charge to the jury, stated in the opinion, is *held* prejudicially erroneous as being argumentative and invading the province of the jury. *Ibid.*

34. Further instructions, stated in the opinion, are *held* erroneous and prejudicial because precluding the jury from considering, in weighing the engineer's testimony, his employment by the defendant, his appearance and demeanor, the probability of his story, and other proper tests. *Ibid.*

Construction: Liability to laborers of contractor.

35. Sec. 1815, Stats. (1898), does not require the notice to be served upon the particular employee in charge of the *construction work* on that part of the road; the intention being that service should be made upon an employee who would be likely promptly to bring home to the company knowledge of the existence of the claim, rather than upon one who would know whether the claim was legitimate or not. *Matzewitz v. W. C. R. Co.* 643

36. Delivery by the laborer of his time check to another person for collection, writing his name on the back thereof as evidence of the authority, and borrowing a small sum from such person on the claim, did not constitute such a transfer of title as took the claim out of the protection of the statute. *Ibid.*

37. The creation of such a mere agency, though coupled with an interest, to collect the claim for the benefit of the laborer, did not make the agent the real party in interest who must be plaintiff in an action to enforce the claim. *Ibid.*

Taxation. See TAXATION, 1–3.

RAPE.

A conviction of rape cannot be sustained upon the uncorroborated testimony of a prosecuting witness whose story is intrinsically improbable and almost incredible, especially if she is a person of feeble mind. *Donovan v. State,* 570

RATIFICATION. See MUNICIPAL CORPORATIONS, 24.

REAL PARTY IN INTEREST. See RAILROADS, 37.

REAL PROPERTY. See ATTACHMENT, 1. BOUNDARIES, 2. CANCELLATION OF INSTRUMENTS. CONSTITUTIONAL LAW, 8, 9. CONTRACTS, 14, 16, 17. DEEDS. DOWER. DRAINS. EJECTMENT. EVIDENCE, 4, 5. INJUNCTION, 2. MILLS AND MILLDAMS, 3. STATES, 4, 5. TAX TITLES. TRUSTS. VENDOR AND PURCHASER.

REASSESSMENT. See TAXATION, 4.

REBATING. See INSURANCE, 4–8.

RECEIVERS. See CORPORATIONS, 5–7.

RECOUPMENT. See CONTRACTS, 13.

REFERENCE. See APPEAL, 1, 12.

REFERENDUM. See CONSTITUTIONAL LAW, 1, 2.

RELIGIOUS SOCIETIES.

Incorporation.

1. Notwithstanding informalities in its articles of incorporation, a religious society which has accepted from a member thereof a subscription to a building fund is, as to the subscriber, a corporation *de facto*. *Evangelish L. St. M. Gemeinde v. Pruess,* 349

Rights of members in property. See SUBSCRIPTIONS.

2. Where property has been acquired, whether by gift or purchase, for the maintenance and support of the faith of a recognized denomination or church, every member of the association acquiring it may resist its diversion to other antagonistic uses, whether secular or religious, and the courts will protect and enforce the trust to apply it to the uses for which acquired and not to inconsistent uses. *Marien v. Evangelical C. Cong.* 31

REMAINDERS. See DOWER, 3.

REMOVAL. See MUNICIPAL CORPORATIONS, 9–12. OFFICERS, 1–4.

REPLEVIN.

See PARTIES.

Ordinarily sole ownership in the plaintiff is not essential to the maintenance of replevin against a stranger who has neither title nor right to possession, it being sufficient in such a case that plaintiff has an interest and is entitled to possession. *Swenson v. Wells,* 316

REQUESTS FOR INSTRUCTIONS. See APPEAL, 3. HIGHWAYS, 17. MASTER AND SERVANT, 18, 32. NEGLIGENCE, 2. TRIAL, 3.

RES ADJUDICATA. See NEW TRIAL, 2. TAX TITLES, 9.

RESCISSION. See CONTRACTS, 3–5, 12–17. LARCENY. VENDOR AND PURCHASER, 3, 4, 6, 8.

RESERVATION in deed. See DEEDS, 2.

RESIDENCE. See DOMICILE. EXTRADITION.

RIGHT OF WAY. See EMINENT DOMAIN, 5. RAILROADS, 2–4. VENDOR AND PURCHASER, 1–6.

RULES OF COURT.
Supreme Court Rule 6 (Cases and briefs), 436, 440.
Supreme Court Rule 44 (Costs for printing case), 440.

SALES.

Construction of contract.

1. A contract obligating the seller to deliver a commodity f. o. b. cars is not a sale *in præsenti*, either when made or when the commodity is manufactured, since the title does not pass to the purchaser until the commodity is delivered by loading it on the cars. *Badger S. L. Co. v. G. W. Jones L. Co.* 73

2. The complaint alleged that the defendant was indebted to the plaintiff for thirty-four loads of gravel "hauled and delivered" at $2.50 per load "for hauling the same." The answer admitted this, but averred that the agreed price was $2 per load. At the trial the complaint was amended so as to claim what the gravel was reasonably worth per load. The court construed the complaint, taken with the answer and the evidence, to present a case for the recovery of the reasonable market value of the gravel sold and delivered by the load, and not an action on contract for services performed. *Held,* that there was sufficient duplicity in the pleadings to make this construction admissible and conclusive on the parties on appeal. *Monture v. Regling,* 407

3. Under such pleadings, questions submitted for special verdict asking whether there was an express agreement for $2 per load,

and, if not, what was the reasonable value per load, sufficiently covered the issues. *Ibid.*

4. To establish the market value of gravel sold and delivered by the load to the defendant, plaintiff introduced evidence as to what other persons had paid him per load and of the comparative size of the loads. *Held*, that such evidence was incompetent, but, its introduction having been permitted, it was error to exclude testimony, offered by defendant in rebuttal thereof, stated in the opinion. *Ibid.*

Rescission by buyer.

5. A vendor by expressly refusing to receive back a machine after breach of warranty, as provided by the contract of sale, waives the return thereof to the place where received as a condition of rescission. *J. I. Case T. M. Co. v. Johnson*, 534

6. The evidence in this case as to the scope of the authority of a general agent of the vendor is *held* to sustain a finding that his act in refusing to receive back a machine was the act of the vendor, although the written contract of sale provided that no person had authority to waive, alter, or enlarge the contract. *Ibid.*

7. Use of a machine by vendee by way of reasonable test only is no obstacle to a subsequent rescission of the contract of sale. *Ibid.*

Breach by seller. See DAMAGES, 7–10.

Warranties. See SALES, 5–7.

SCHOOLS AND SCHOOL DISTRICTS.

Government: Power to determine amount to be raised for school purposes in cities operating under general charter law.

1. Where it is sought to show that the provisions of the general charter law relating to schools do not apply to a city adopting that law in its entirety, and that the provisions of a special charter do apply, the language relied on to express such intent should be reasonably plain, and it should not be extended by implication or by doubtful construction so as to vest important powers in different bodies in cities operating under a general law. *State ex rel. Jones v. Burke*, 524

2. Under the special charter of the city of Beaver Dam the power to determine the amount of school moneys to be raised was vested in an elective school board. The city adopted the general charter law, under sec. 925—113 of which "the election and organization, powers and duties" of the board were not affected. That section was subsequently repealed and a new section enacted, providing that where there was an elective board "the plan of school organization and management" should continue until changed by vote of the electors. *Held*, that the power to determine the amount of school moneys to be raised was not a part of "the plan of school organization and management," and that after the enactment of the new section (sec. 925—113, Stats.: Laws of 1907, ch. 480) that power was in the common council, being vested in that body by other provisions of the general charter law. *Ibid.*

Claims: Actions against school officers.

3. In an action upon an agreement by which defendants bound themselves individually and as school district officers to pay for cer-

tain goods in cash or a legally issued school warrant, plaintiff cannot recover from the defendants individually without showing that the school warrant which was in fact issued as payment was illegally issued. *State Bank v. Kienberger*, 517

4. A school warrant or order issued by the proper officers of a school district will be presumed to be a legal order until the contrary is shown. *Ibid.*

5. Where a purchase of school supplies was never authorized or approved at a meeting of the district board, as required by secs. 432, 436, Stats. (1898), and a school warrant or order issued in payment therefor was not authorized or ratified at a board meeting but was signed by the members of the board independently and not in the presence of each other, such warrant was not legally issued. *Ibid.*

SETOFF. See CONTRACTS, 13.

SHERIFFS. See COURTS, 6, 7.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 17, 18, 21, 22.

SPECIAL LAWS. See CONSTITUTIONAL LAW, 11. MUNICIPAL CORPORATIONS, 23.

SPECIAL VERDICT. See CARRIERS, 5, 7. HIGHWAYS, 11, 12. MASTER AND SERVANT, 11, 12, 32. NEGLIGENCE, 3. SALES. STREET RAILWAYS, 3. TRIAL, 3, 5–7.

SPECIFIC PERFORMANCE. See CONTRACTS, 3. EJECTMENT, 5–8. VENDOR AND PURCHASER, 7.

SPECULATIVE DAMAGES. See DAMAGES, 2, 4, 6.

STATES.

Property: Municipal regulation.

1. Statutes in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests. *Milwaukee v. McGregor*, 35

2. General prohibitions in general laws, or in a city ordinance made pursuant to general charter authority, apply to all private parties but are not rules of conduct for the state. *Ibid.*

3. The state may have the benefit of general laws but is not adversely affected by any unless it is so expressly provided. *Ibid.*

4. A state board empowered to take and hold the title to property for state purposes does not own such property in any proprietary sense,—it is state property, to all intents and purposes, the same as in case of title thereto being formally vested in the state. *Ibid.*

5. In case of the construction of a building by a state board for state purposes under state authority the matter is wholly of state concern and not under any general state or municipal regulation. *Ibid.*

STATUTES.

Enactment. See CONSTITUTIONAL LAW, 1, 2, 5–7,

Private or local laws. See CONSTITUTIONAL LAW, 1, 2, 5–7, 11.

Mandatory or directory? See CRIMINAL LAW, 1. COURTS, 8. MUNICIPAL CORPORATIONS, 19. STATUTES, 2.

Penal statutes. See EVIDENCE, 1. STATUTES, 3–5.

Amendment. See SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

Repeal. See CONSTITUTIONAL LAW, 12, 13.

Validity.

1. Where parts of a statute are valid and capable of being executed independently of other parts which are invalid, the valid parts may become operative unless the court can say that the legislature intended that all the provisions should be carried into effect as a whole and as conditions and compensations for each other. *State ex rel. Williams v. Sawyer Co.* 634

Exceptions in statutes. See HEALTH. INDICTMENT AND INFORMATION, 1.

Construction. See APPEAL, 1, 19–22. AUTOMOBILES. CONSTITUTIONAL LAW, 3, 7, 10. CORPORATIONS, 2–4. COSTS, 3, 4. COURTS, 2, 3, 8. CRIMINAL LAW, 1, 25. DAMAGES, 13. DESCENT AND DISTRIBUTION. DOWER, 1–3. DRAINS. EVIDENCE, 6. FOOD, 1. HIGHWAYS, 4–6, 13, 14. INSANE PERSONS, 1, 2. JUSTICES' COURTS. MASTER AND SERVANT, 4, 12, 22, 23. MILLS AND MILLDAMS, 1–5. MUNICIPAL CORPORATIONS, 3, 6, 8, 10, 19, 21, 23. OFFICERS, 4. RAILROADS, 2–4, 6–15, 17–25, 28. SCHOOLS AND SCHOOL DISTRICTS, 1, 2, 5. STATES, 1–3. STREET RAILWAYS, 1, 2. SUNDAY LAWS, 1, 2, 5. TAXATION, 1, 4. TAX TITLES, 1, 2, 4–6. TRIAL, 4, 5. TRUSTS AND TRUSTEES. WITNESSES, 3, 4.

2. The ordinary and natural meaning of the word "may," when used in a statute, is permissive and discretionary, not mandatory, although it is construed as mandatory when such construction is necessary to give effect to the clear purpose and intent of the statute. *Barber A. P. Co. v. Oshkosh,* 58

3. A penal statute is open to construction when there is reasonable uncertainty as to its meaning. *Weirich v. State,* 93

4. In case of there being two or more equally reasonable meanings of a penal statute, that one is to be regarded as expressing the legislative will which is the least severe as regards previous conditions. *Ibid.*

5. The rule of strict construction of a penal law is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose. *Ibid.*

6. Where the words of a statute are plain in meaning and lead to no absurd result there is neither room for construction nor justification for the elimination or change of words. *Ashland v. Maciejewski,* 642

Federal statutes. See BANKRUPTCY, 3. INDIANS, 3, 5. PENSIONS, 1.

STATUTES CITED, ETC.

(See page xxxiii, following CASES CITED.)

STOCK AND STOCKHOLDERS. See CONTRACTS, 14, 16, 17. CORPORATIONS, 1, 5.

STREET RAILWAYS.

Interurban railways: Condemnation of streets.

1. A corporation having a franchise from the state to operate a street railway for carrying passengers in the city, and no authority to operate an interurban railway on the streets, had no right to condemn the use of the street for interurban railway business;

and until it acquired such right the period of limitation under sec. 4222, Stats. (1898), barring proceedings by a landowner under sec. 1852, did not begin to run. *In re Plowright*, 512

2. Delay of an interurban railway company for more than four months after acquiring the right to institute proceedings for condemnation of a street is *held*, under the facts of this case, to warrant a landowner in proceeding in the matter under sec. 1852, Stats. (1898). *Ibid.*

Injuries to travelers.

3. In an action for death of a person caused by collision between his wagon and a street car which came from behind, findings in a special verdict, supported by the evidence, stated in the opinion, establish the contributory negligence of the deceased and are not nullified by a further finding that he was not guilty of such negligence. *Vetter v. Southern Wis. R. Co.* 296

4. A person driving on the highway is bound to look and listen for the approach of a street car before going so near the track that a car cannot pass without striking his wagon; and it is immaterial in such a case whether or not he intends to drive upon or across the track. *Ibid.*

Injuries to passengers. See CARRIERS, 8.

STREETS. See MUNICIPAL CORPORATIONS, 17–25. TELEGRAPHS AND TELEPHONES, 1, 2.

SUBSCRIPTIONS.

See RELIGIOUS SOCIETIES.

1. A subscription for the building of a church, made upon condition that the subscriber should not be called upon for certain work and that the church corporation should accept it as being in full of his share of the expense of building, was a mere offer until accepted as stipulated. *Evangelish L. St. M. Gemeinde v. Pruess*, 349

2. Where no other kind of acceptance is stipulated for, a subscription may be accepted by expending money and erecting a building in accordance with the offer. *Ibid.*

3. The evidence in this case is *held* not to show, as matter of law, acceptance of a subscription upon the condition stipulated, before a withdrawal thereof. *Ibid.*

SUNDAY LAWS.

1. In sec. 4595, Stats. (1898), the exception of "works of necessity and charity" relates to the doing of "labor, business or work" and not to keeping open a "shop, warehouse or workhouse." *Stark v. Backus*, 557

2. The proviso added to said sec. 4595 by ch. 300, Laws of 1909, that "keeping open a barber shop on Sunday . . . shall not be deemed a work of necessity or charity," did not change the effect of the statute or render it invalid as being discriminatory against the keepers of such shops and as denying to them the equal protection of the law or depriving them of liberty or property without due process of law. *Ibid.*

3. Neither before nor after the addition of such proviso could keeping open a barber shop on Sunday be justified as a work of ne-

cessity or charity; nor would the state be obliged, in a prosecution for keeping open any shop, workhouse or warehouse in violation of said section, to plead or prove that such act was not a work of necessity or charity. *Ibid.*

4. Even if, when it enacted said proviso, the legislature supposed that the exception as to works of necessity and charity applied to the keeping open of a shop, warehouse, or workhouse, that fact is not controlling upon the question of the construction of the pre-existing statute. *Ibid.*

5. The complaint in this action to have sec. 4595, Stats. (1898), as amended, declared void, and to restrain the district attorney and others from instituting any proceeding against plaintiff for violation thereof, is *held* not to make a proper case for the exercise of the power of a court of equity to enjoin the enforcement of the criminal law. *Ibid.*

SUPREME COURT. See APPEAL. CRIMINAL LAW, 25, 26.

SURVEYS. See HIGHWAYS, 6–9.

TAXATION.

Exemptions.

1. Property of a railway company necessarily used in operating its road is exempt from local taxation under sec. 1215—25, Stats. (Supp. 1906), if the use to which it is applied is a public use under the articles of incorporation and charter of the company. *State ex rel. N. W. C. R. Co. v. Willcuts,* 448

2. Whether the property of a railway company is devoted to a public use is not determined by the extent of the use but by the right of the public generally to use it and the fact that it is used by all who desire to do so. *Ibid.*

3. The mere fact that a large part of the business done by a railway company is done for a coal company owned and controlled by practically the same persons, does not deprive the railway company of its character as a common carrier or render its property devoted to a private use, so long as it was in fact organized as a common carrier and serves the public in that capacity, although location and conditions limit the extent of such service. *Ibid.*

Assessment. See CERTIORARI.

Reassessment.

4. The power of the county board under sec. 1186, Stats. (1898), to direct a reassessment of the taxes justly chargeable upon lands when the original assessments were invalid because of irregularities in the tax proceedings, embraces all cases in which, under sec. 1184, by reason of the invalidity of the tax sales or certificates, the county is liable to refund the money paid to it, including a case where the land was misdescribed in the original assessment and the tax certificate, if the description was sufficient to enable the board to ascertain what land was actually attempted to be assessed. *Roberts v. Waukesha Co.* 593

TAXPAYER'S ACTION. See PLEADING, 6.

TAX TITLES.

Validity. See CANCELLATION OF INSTRUMENTS.

Notices of tax sale: Posting and publication: Affidavits.

1. If the affidavit of the posting of notices of a tax sale declares conduct of the treasurer in the posting which complies with the

statute, the validity of that step in the proceedings is established *prima facie*. A statement therein that the notices were posted in four public places, accompanied by a specification of places not inherently non-public, is such evidence as, undisputed, establishes the fact required by sec. 1130, Stats. (1898). *Bouchier v. Hammer*, 648

2. The term "public place" in sec. 1130, Stats. (1898), means a place where the public resort, so that the posting of a statement there is likely to give notice. *Ibid.*

3. An affidavit stating that the place in the county treasurer's office at which one of the notices was posted was a conspicuous place, satisfies the statute, and it is not necessary to define with particularity the exact spot in that office upon which such notice was posted. *Ibid.*

4. A printer's affidavit stating that the notice of a tax sale which took place on May 17 was printed and published in a certain newspaper "once in each week for four successive weeks, commencing on the 15th of April and terminating on the 6th of May," shows a publication once in each week for four successive weeks prior to the date of sale, as required by sec. 1130, Stats. (1898), although the printing terminated in twenty-two days. *Ibid.*

5. An affidavit of nonoccupancy, made five days before the tax deed was issued, which declared both that at the time it was made, May 16, there had not been thirty days of continuous actual occupancy, and that on that day there was no occupancy, establishes the fact that there could not have been the thirty consecutive days' occupancy within the meaning of sec. 1175, Stats. (1898), on May 21, the date of the deed. *Ibid.*

Payment of tax.

6. The holder of a tax certificate issued in 1902 who purchased the land at the tax sales in 1903 and 1904 did not thereby pay the taxes so as to prevent him from claiming title under either of the tax deeds based on such sales. *Bouchier v. Hammer*, 648

Persons entitled to acquire tax titles.

7. A person employed by a lumber company as superintendent and in charge of its business in a county was not precluded by such position from taking a certificate in his own name at a tax sale of the company's land, where he was not charged with the duty of paying the taxes nor furnished with money for that purpose. *T. D. Kellogg L. & M. Co. v. Webster M. Co.* 341

8. Where under a mortgage or trust deed the owner of the equity of redemption is bound to pay all taxes upon the land he cannot, as against the mortgagee, ascribe such payment to his attitude as claimant under a tax title, especially where the tax title is void as a title and effective merely as a lien. *Roach v. Sanborn L. Co.* 435

9. In an action by the holder of notes secured by a trust deed to set aside certain tax deeds of the lands it was decided on a former appeal that the tax deeds were void and that plaintiff was entitled to have them set aside on payment of the amounts for which the lands were sold and "the amounts of subsequent taxes paid by the tax-title claimant," with interest, as provided in sec. 1210*h*, Stats. (1898). Before the action was commenced defendant had acquired the fee title to the equity of redemption from the grantors in the trust deed, which deed contained the usual covenant for payment of taxes. *Held*, that

taxes paid by defendant after acquiring such fee title were not "paid by the tax-title claimant" within the meaning of the former decision, and plaintiff was not bound, either by sec. 1210*h* or by the mandate on the former appeal, to reimburse defendant therefor. *Ibid.*

TELEGRAPHS AND TELEPHONES.

Regulation: Removal of poles.

1. Where a telephone company, operating under a city ordinance requiring it to locate its poles as directed by the council, paid no attention to a resolution of the council, served upon the company, directing removal of a pole set without previous authority, it cannot complain because the mayor and other officers carried out the directions of the council and removed the pole. *Monroe Tel. Co. v. Ludlow,* 510

[2. Whether the mayor and aldermen were justified in summarily removing the pole as an obstruction in the public streets under secs. 1326, 1347, Stats. (1898), not determined.] *Ibid.*

Damages. See DAMAGES, 4–6.

Same: Instructions to jury.

3. In an action against a telegraph company for damages caused by failure to deliver a telegram, an instruction that, in order to find that plaintiff lost a contract of employment by such nondelivery, the jury must be satisfied that the person sending the telegram had authority from the alleged employer to make such contract, did not invade the province of the jury and was not erroneous, there being evidence of such authority. *Stumm v. W. U. Tel. Co.* 528

TIME CHECKS. See RAILROADS, 36, 37.

TITLE OF ACT. See CONSTITUTIONAL LAW, 5–7.

TOLL ROADS. See AUTOMOBILES. HIGHWAYS, 3.

TOWNS. See HIGHWAYS, 10–12.

TRIAL.

Reception of evidence. See APPEAL, 22, 24–26. BOUNDARIES. CRIMINAL LAW, 2–9. FOOD, 1. HIGHWAYS, 15. HOMICIDE, 1, 2. JUSTICES' COURTS. MASTER AND SERVANT, 17, 28, 29. SALES, 4. WITNESSES, 4, 5.

Arguments and conduct of counsel.

1. A model produced by plaintiff having been excluded because incorrect, remarks of plaintiff's counsel in his argument to the jury to the effect that defendant produced no model because it would be less favorable to it than that produced by plaintiff, are *held* not ground for reversal, in view of an instruction to the jury that no inference adverse to defendant should be drawn from the argument of plaintiff's counsel, except in so far as that argument was based on testimony. *Monaghan v. N. W. Fuel Co.* 457

Taking case or question from the jury. See CARRIERS, 4. CONTRACTS, 2. CRIMINAL LAW, 10, 11. DAMAGES, 5. INSURANCE, 2. MASTER AND SERVANT, 3, 4, 8, 16. RAILROADS, 30, 32, 33. TELEGRAPHS AND TELEPHONES, 3.

2. On a jury trial where different minds might reasonably draw different conclusions from the evidence as to a fact in issue, the

jury, rather than the court, should draw the inference. *Miller v. Sovereign Camp*, 505

Instructions to jury. See APPEAL, 3, 23. CRIMINAL LAW, 12–18, 22. DAMAGES, 16, 17. HIGHWAYS, 16–18. MASTER AND SERVANT, 13, 18, 32. NEGLIGENCE, 1, 2. RAILROADS, 31, 33, 34. TELEGRAPHS AND TELEPHONES, 3. WITNESSES, 6.

Requests for instructions. See APPEAL, 3. HIGHWAYS, 17. MASTER AND SERVANT, 18, 32. NEGLIGENCE, 2.

3. In the absence of a request therefor, omission to give any instructions relative to a question submitted for special verdict is not error. *Monaghan v. N. W. Fuel Co.* 457

Findings. See APPEAL, 6, 11–17, 28. DIVORCE. MILLS AND MILLDAMS, 5, 6. NAVIGABLE WATERS, 1.

Verdict. See CRIMINAL LAW, 6, 19–21. HOMICIDE, 4, 5. NEW TRIAL, 2.

4. Under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), defendant, having failed to request that the question of its negligence be submitted to the jury, waived the right to have the jury pass thereon; and, there being evidence to support a finding of such negligence, it must be presumed that the court in rendering judgment for plaintiff determined the question adversely to defendant. *Bates v. C., M. & St. P. R. Co.* 235

Special verdict. See CARRIERS, 5, 7. HIGHWAYS, 11, 12. MASTER AND SERVANT, 11, 12, 32. NEGLIGENCE, 3. SALES, 3. STREET RAILWAYS, 3. TRIAL, 3.

5. In an action for malicious prosecution the special verdict did not contain any finding as to whether or not there was probable cause for the prosecution, but judgment was rendered thereon for plaintiff. *Held*, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), the case must be treated on appeal as though the court had found as a fact that there was lack of probable cause and appellant had excepted to the finding. *Farrell v. Phillips*, 611

6. Each separate question of a special verdict is to be answered upon all the competent evidence bearing thereon and as if this were the only issue in the case. *Nelson v. A. H. Stange Co.* 657

7. Where by separate answers defendant's actionable negligence in three particulars was found in a special verdict, a further finding that "such negligence was the proximate cause of plaintiff's injury" was not insufficient on the ground that the jury might not have been unanimous as to which particular item of negligence was the proximate cause. *Ibid.*

TRUSTS AND TRUSTEES.

See BANKRUPTCY.

Under secs. 2086, 2087, Stats. (1898), when a trust in lands is created and the lands at the same time granted or devised subject to the execution of the trust, the trustee takes only such interest as the purposes of the trust require, and the grantee takes the entire title as against the world in general, and as against the trustee he takes the beneficial equitable interest subject only to the execution of the trust according to its terms. *Will of Prasser*, 92

UNDUE INFLUENCE. See WILLS, 2.

VARIANCE. See EMBEZZLEMENT, 1. FOOD, 1. PLEADING, 7. PRINCIPAL AND SURETY.

VENDOR AND PURCHASER OF LAND.

Construction and operation of contract.

1. Whether, where a railroad company had agreed to procure certain land and convey it to plaintiffs "by good warranty deed" in exchange for land owned by them, the tender to them of a full warranty deed from the true owner of the land might be held a sufficient performance on the part of the company, even without covenants of warranty from itself, not determined. *Mahn v. C. & M. E. R. Co.* 8

2. Where, in such case, plaintiffs were informed when such warranty deed was tendered that the grantor named therein held title "in trust" for the railroad company, and that the consideration for the land had been paid by the company, the nature of the trust not being disclosed, they were not bound to accept the deed as a compliance with the contract. *Ibid.*

3. Upon the failure of the company to perform on its part the agreement to exchange lands, plaintiffs had the right either to sue for damages for the breach or to rescind the contract. The company could not compel them to sell their land for a sum of money which they had never agreed to accept. *Ibid.*

4. Plaintiffs in such case having brought suit in equity for rescission of the agreement, the failure of the railroad company to object may be deemed a consent that the court, by exercise of its equitable powers, grant whatever form of relief is proper under the circumstances. *Ibid.*

5. The agreement for exchange of lands having been followed by completed construction of the railroad over plaintiffs' land, no mere recovery at law could fully re-establish plaintiffs' rights, since the transaction amounted at least to a consent to the construction of the road, and such a status, once created by consent, would not be disturbed. *Ibid.*

6. Unless completely rescinded, the written agreement for exchange would constitute an obstacle to plaintiffs' obtaining statutory compensation for the part of their land applied to railroad uses, and even after declaration of rescission it would be a cloud upon the title which equity should remove. *Ibid.*

Performance of contract. See EJECTMENT, 5–8.

7. In an action by the vendor for specific performance of a land contract, findings as to the true location of a quarter-post as established by the original government survey, and that the true boundaries of the tract sold were pointed out by the vendor to the vendee, are *held* to be sustained by the evidence. *Day v. Egertsen,* 629

8. A mere representation by description in a land contract that the land is half of a certain designated quarter-section cannot in an action for deceit or for rescission be held to be a representation that it contains eighty acres. *Ibid.*

9. Designation of a tract of land in conversation between the vendor and vendee as "the east eighty" of a certain quarter-section was not in this case intended or understood as a representation of

quantity or area, but was merely a short way of referring to the government subdivision. *Ibid.*

VERDICT. See CRIMINAL LAW, 6, 19–21. NEW TRIAL, 2. TRIAL, 4–7.

VESTED RIGHTS. See DOWER, 1. RAILROADS, 4. WILLS, 4–6, 10.

VILLAGES. See MUNICIPAL CORPORATIONS, 1–6, 17, 18, 20–22.

VOIR DIRE. See JURORS.

WAIVER.

See CONTRACTS, 13. CRIMINAL LAW, 27. DAMAGES, 9. INSURANCE, 3, 4. PLEADING, 5. SALES, 5. TRIAL, 4.

1. If a person with knowledge, actual or constructive, so acts in regard to contractual relations that the reasonable inference under all the circumstances is that he has abandoned a claim of right, and the adverse party in such relations acts on the faith of such inference, as a general rule an effectual intent to waive is implied though there is no such intent in fact, and even if there be an undisclosed intent to the contrary, and regardless of any element of estoppel strictly speaking. *McNaughton v. Des Moines L. Ins. Co.* 214

2. Waiver must be with knowledge or with reasonable means of knowledge of the facts and with intent to forego some right, although the knowledge may be either actual or constructive and the intent expressed or implied. *Castello v. Citizens State Bank,* 275

WARRANTY. See CONTRACTS, 15.

WATERS AND WATERCOURSES. See CONSTITUTIONAL LAW, 7–9. CORPORATIONS, 2. DRAINS, 1. EMINENT DOMAIN, 2. MILLS AND MILLDAMS. NAVIGABLE WATERS.

WATERWORKS. See MUNICIPAL CORPORATIONS, 26, 27.

WILLS.

Probate: Mental capacity.

1. Evidence stated in the opinion is *held* to sustain a finding that testatrix had sufficient mental capacity to make a will. *Fowler v. Crandall,* 291

Same: Undue influence.

2. Evidence stated in the opinion is *held* to sustain a finding that the execution of a will was not procured by undue influence. *Ibid.*

Construction: Nature of estates and interests created.

3. In determining the nature of an estate created by will the will itself is to be first construed to ascertain the testator's intention, and afterwards the statute is to be consulted to ascertain how far the estate intended is affected thereby. *Will of Prasser,* 92

4. In the construction of a will the law leans, in doubtful cases, in favor of an absolute rather than a defeasible estate, and of a vested rather than a contingent interest. *Ibid.*

5. While the general rule is that a gift will be deemed contingent when it is found only in a direction to divide at a future time, this is subordinate to the primary rule that the intent, to be collected from the whole will, must prevail. *Ibid.*

6. A will gave the use of all testator's property to his widow during her life, and provided that after her death the property should be held in trust for ten years, the net income during that time to be divided equally among his children. It then provided that after the expiration of said ten years "all my estate and property then remaining in the hands of my said trustees I hereby give, devise, and bequeath unto all my children in equal parts, share and share alike." *Held*, that the interests of the children became vested at the time of testator's death, subject only to the life estate of the widow and the ten-year trust. *Ibid.*

7. A will giving to a person named "all the rest, residue, and remainder" of an estate, subject to certain bequests, does not dispose of a remainder over at the death of such person. *Bowker v. Shields*, 330

8. A will bequeathed money in trust for the support of an insane son of testatrix, and provided that after his death the residue thereof be divided among her nieces "who may be unmarried at that date." At the death of the son six nieces of the testatrix were living, four of whom had never been married and two had been married since before the date of the will. *Held* that, applied to such situation, there could be no ambiguity in the word "unmarried." *McMichael v. Peterman*, 589

9. Whether such bequest, by being in restraint of marriage and by offering inducement to the married nieces to become unmarried by divorce or otherwise, is so contrary to public policy as to be invalid, not determined. The married nieces not being shown to be next of kin or beneficially interested in the estate are not prejudiced by a decision of the circuit court holding the bequest valid. *Ibid.*

10. It cannot be considered that such bequest gave a vested estate from testatrix's death to all the nieces (including those then married) as a class, with simply a condition subsequent divesting such interest in the event of marriage, and that such condition is void as against public policy. Under the terms of the will the married nieces were never members of any such class. *Ibid.*

Same: Rights of devisees and legatees: Lapses. See DESCENT AND DISTRIBUTION.

WITNESSES.

Compensation. See COSTS, 2.

Competency. See EMINENT DOMAIN, 6. EVIDENCE, 8, 9. HIGHWAYS, 15. HUSBAND AND WIFE, 2.

Examination. See EMINENT DOMAIN, 5, 6. EVIDENCE, 10–12. MASTER AND SERVANT, 14.

Cross-examination. See CONTRACTS, 1. EVIDENCE, 8. MASTER AND SERVANT, 14. WITNESSES, 5.

1. Where, from the questions asked, an attempt to extend a cross-examination to matters not covered by the direct examination could fairly be inferred, it was not an abuse of discretion to limit the cross-examination rather strictly. *Dralle v. Reedsburg*, 319

2. Cross-examination need not be limited to the exact words of the direct examination. *Nelson v. A. H. Stange Co.* 657

Credibility. See CRIMINAL LAW, 8, 15, 16.

3. Contempt of court, either civil or criminal, is not a "criminal offense" within the meaning of sec. 4073, Stats. (1898), which permits "conviction of a criminal offense" to be proved to affect the credibility of a witness, either by the record or by cross-examination. *Farrell v. Phillips,* 611

4. Where, under sec. 4073, Stats. (1898), the credibility of a witness is sought to be affected by proof of conviction of a criminal offense, such proof should consist of the record of the conviction and judgment alone, and not the full record of the case. *Ibid.*

5. A single isolated act of contempt of court committed twelve years prior to the trial does not properly come within the rule which permits, upon cross-examination, inquiries into the previous life, habits, and occupation of a witness, as tending to throw light on his veracity. *Ibid.*

Same: Instructions to jury.

6. A charge that the testimony of a witness was of a negative character and not entitled to the same weight as that of another witness was erroneous, both because the testimony of the first witness, though negative in form, was positive in fact, and because the jury might well be of the opinion that the witnesses were not equally credible. *Bodenheimer v. C. & N. W. R. Co.* 623

Corroboration. See CRIMINAL LAW, 16. RAPE.

WORDS AND PHRASES.

Adverse, in finding. See MILLS AND MILLDAMS, 6.
Aggrieved, in statute. See INSANE PERSONS, 2.
All the rest, residue, and remainder, in will. See WILLS, 7.
Any milldam, in statute. See MILLS AND MILLDAMS, 1.
A question of engineering. See CARRIERS, 2.
Bond, contract, or other obligation, in statute. See MUNICIPAL CORPORATIONS, 16.
By good warranty deed, in contract. See VENDOR AND PURCHASER, 1, 2.
Corporate power or privilege, in constitution. See CONSTITUTIONAL LAW, 10.
Could, in instructions to jury. See MASTER AND SERVANT, 13.
Criminal offense, in statute. See WITNESSES, 3.
Direct loss or damage by fire, in insurance policy. See INSURANCE, 1.
Engaged in the line of his duty as such, in statute. See MASTER AND SERVANT, 4.
Estate of inheritance. See DOWER, 4.
Flowing of lands of the owner. See MILLS AND MILLDAMS, 4.
Hostile fire. See INSURANCE, 1.
Injury. See EVIDENCE, 10.
Inspect. See MASTER AND SERVANT, 9.
Lawful business or purpose. See CORPORATIONS, 3.
Legally issued. See SCHOOLS AND SCHOOL DISTRICTS, 5.
May, in statute. See MUNICIPAL CORPORATIONS, 19. STATUTES, 2.
Milldam, in statute. See MILLS AND MILLDAMS, 2.
Office. See OFFICERS, 2.
Other things, in instruction to jury. See MASTER AND SERVANT, 32.
Paid by the tax-title claimant. See TAX TITLES, 9.
Person aggrieved, in statute. See INSANE PERSONS, 1, 2.
Plan of school organization and management. See SCHOOLS AND SCHOOL DISTRICTS, 2.
Public highway, in statute. See AUTOMOBILES. HIGHWAYS, 1–5.

Public place, in statute. See TAX TITLES, 2, 3.
Public purpose. See EMINENT DOMAIN, 2.
Public use. See TAXATION, 2, 3.
Regulate. See MUNICIPAL CORPORATIONS, 7.
Reserving the pine and cedar timber now growing or being thereon and the right to cut and remove same, in deed. See DEEDS, 2.
Restrain. See MUNICIPAL CORPORATIONS, 7.
Seised of an estate of inheritance, in statute. See DOWER, 3.
Seisin, in statute. See DOWER, 1.
Shall inure wholly to the benefit of such pensioner, in statute. See PENSIONS, 2.
Simple tool. See MASTER AND SERVANT, 7.
The east eighty, in conveyance. See VENDOR AND PURCHASER, 9.
Unmarried, in will. See WILLS, 8.
With the right of the grantee to enter upon said lands and remove said timber any time on or before (a certain date), in deed. See DEEDS, 3.
Works of necessity or charity, in statute. See SUNDAY LAWS, 1.

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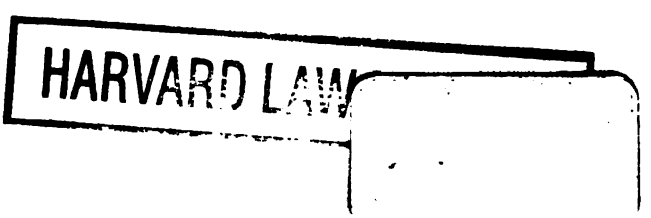
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